SUPREME COURT OF THE UNITED STATES.

No. 350.

JOEL H. WICKER, PLAINTIFF IN ERROR,

vs.

ELI HOPPOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit of the United States within and for the northern district of Illinois, at the city of Chicago in the district aforesaid, before the Hon. Thomas Drummond, judge of the district court of the United States for said northern district of Illinois, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Saturday, the twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the United States the ninety-first year.

WM. H. BRADLEY, *Clerk.*

ELI HOPPOCK
vs. } Assumpsit.
JOEL H. WICKER.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and sixty-
2 five, came the said Eli Hoppock, plaintiff, by Scammon, McCagg & Fuller, his attorneys, and file in said court a bond for costs, and also a præcipe, which said bond and præcipe are in the words and figures following, to wit:

Bond.

United States circuit court.—March term, A. D. 1866.

ELY HOPPOCK
vs. } In assumpsit.
JOEL H. WICKER.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

We hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court.

Dated this twenty-ninth day of December, A. D. 1865.

SCAMMON, McCAGG & FULLER.

Indorsed: Filed Dec. 29th, 1865.

WM. H. BRADLEY, *Clerk.*

3 *Præcipe.*

United States circuit court.—March term A. D. 1866.

ELY HOPPOCK
vs. } In assumpsit. Damages $5,000.
JOEL H. WICKER.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The clerk of said court will please issue a summons in the above

cause, directed to the marshal of said district, in a plea of trespass on the case on promises, returnable at the March term of said court, A. D. 1866, to the damage of the plaintiff of five thousand dollars.

SCAMMON, McCAGG & FULLER,
Pl'ffs Attorneys.

Chicago, Dec. 29, 1865.
To WM. H. BRADLEY, esq., *Clerk*.

Indorsed: Filed Dec. 29, 1865.

WM. H. BRADLEY, *Cl'k.*

4 And therefore a writ of summons was issued out of the said court, in said entitled cause, which, together with the marshal's return thereon, are in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Joel H. Wicker, if he shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago in the district aforesaid, on the first Monday of March next, to answer unto Ely Hoppock, in a plea of trespass on the case upon promises, to his damage, as he alleges, of five thousand dollars, and have you then and there this writ.

5 Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 29th day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the 90th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

50-cts. rev. stamp, cancelled.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents, that I have appointed, and by these presents do appoint, Spencer B. Webb my true and lawful deputy to execute the annexed writ, Ely Hoppock *vs.* Joel H. Wicker, and to make true return thereon, according to law.

[SEAL.] J. R. JONES,
United States Marshal of the Northern District of Illinois.

I have this 3d day of February, A. D. 1866, executed the annexed writ, by reading the same to and in the presence and hearing of Joel H. Wicker therein named.

J. R. JONES,
United States Marshal of the Northern District of Illinois.

6 By SPENCER B. WEBB,
Special Deputy.

Spencer B. Webb, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me, this 5th day of March, A. D. 1866.

P. A. HAYNE, *U. S. Com.*

[5-ct. stamp, cancelled.]

Indorsed: Filed March 5th, A. D. 1866.

WM. H. BRADLEY, *Clerk.*

7 And afterwards, to wit, on the 14th day of February, A. D. 1866, the said plaintiff, by Scammon, McCagg & Fuller, his attorneys, filed in said court, with the clerk thereof, his declaration against the said defendant in the words and figures following, to wit:

Declaration.

In United States circuit court, northern district of Illinois, to March term, A. D. 1866.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Ely Hoppock, who is a citizen of the State of New York, plaintiff in this suit, by Scammon, McCagg & Fuller, his attorneys, complains of Joel H. Wicker, who is a citizen of the State of Illinois, defendant in this suit, who was summoned, &c., in a plea of
8 trespass on the case on promises.

For that whereas heretofore, to wit, on the first day of November, A. D. 1859, at the northern district of Illinois, the said defendant undertook and promised the said plaintiff that if he, the said plaintiff, would prosecute John P. Chapin & Co., by suit at law, on certain debts and demands which he, the said plaintiff, then claimed to have against said firm of John P. Chapin & Co. and the defendant, for rent of divers lots of land in the county of Fulton and State of Illinois, and recover judgments against said John P. Chapin & Co. on said debts and demands, and which amounted in all to about seventeen hundred dollars, ($1,700,) and would sue out executions on said judgments against said John P. Chapin & Co., and levy them on certain premises, occupied and used as and for a distillery, in the town of Liverpool, county of Fulton and State of Illinois, and more particularly described as lots four, five, six, seven, eight, and nine, in block fifty-two, in the town of Liverpool, in Fulton county, Illinois, and expose the said premises for sale on said executions, that
9 he, the said defendant would bid off said property at such sale for the full amount of the debt and costs, which he, the said plaintiff, might recover against said John P. Chapin & Co., as above described, and that he would pay the taxes assessed upon said premises for the year A. D. 1859, and would pay the premiums for the renewal of two policies of insurance upon the buildings on said premises, and which were then held by the said plaintiff.

And said plaintiff avers, that relying on said undertaking of said defendant, he commenced suit against said John P. Chapin & Co. on

the aforesaid causes of action which he claimed to have against them and said defendant in the circuit court of Cook county, State of Illinois, and such proceedings were had in said cause, that, at the November term A. D. 1860, of said court, the plaintiff recovered a judgment against said John P. Chapin & Co. for nine hundred and ten dollars ($910 00) damages, and twenty-six dollars and eighty cents ($26 80) for plaintiff's costs, and three dollars and fifty-five cents ($3 55) for defendants' costs of suit, on which judgment an ex-
10 ecution was issued, dated January sixteenth, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the nineteenth day of January, A. D. 1861, and was by him levied on the said premises by the description of lots four, five, six, seven, eight, and nine, in block fifty-two, in Liverpool, in said county of Fulton and State of Illinois, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to a certain distillery situated on the said premises, on the eighth day of March, A. D. 1861, and the said premises were by him exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

And said plaintiff further avers that he, the said plaintiff, relying on the said promise and undertaking of the said defendant, commenced a suit against the said John P. Chapin & Co. on the aforesaid causes of action, which he claimed to have against them and said defendant, in the superior court of Chicago, in the county of Cook and State of Illinois, and such proceedings were had in said cause, that at the February term, A. D. 1861, of said court, the said
11 plaintiff recovered a judgment against said John P. Chapin & Co. for seven hundred and six dollars and four cents (706 04) damages, and ten dollars and seventy cents ($10 70) costs of suit, on which judgment an execution was issued, dated February eleventh, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the fifteenth day of February, A. D. 1861, and was by him levied in the said premises by the description of lots four, five, six, seven, eight, and nine, in block fifty-two, in the town of Liverpool in said county of Fulton and State of Illinois, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to a certain distillery situate on the said premises, on the eighth day of March, A. D. 1861, and the said premises were by him exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

Of all which proceedings the said defendant had due notice and was also reasonably notified by the said plaintiff of the time and place of sale of said premises, under said two executions as aforesaid.

12 Yet the said defendant, not regarding his aforesaid promise and undertaking in that behalf, did not attend at said sale, nor bid off said premises, nor any part thereof, but wholly neglected and refused so to do, whereby and by reason whereof said premises were sold for, to wit. the sum of two dollars, being one dollar on

each of said two executions, and by reason of the premises, the plaintiff was put to great loss, expense, and damage, and has wholly failed to receive payment of any part of his aforesaid claims and demands against the said John P. Chapin & Co., except the sum of two dollars as aforesaid, but the same, together with large arrears of interest, remains wholly unpaid.

And the said plaintiff further avers that said defendant has never paid the taxes on said premises for the year A. D. 1859, but has wholly neglected and refused to pay them, whereby the plaintiff became liable to pay the same, with large arrears of interest and subsequent taxes on said lots therefor; and the plaintiff further says that the defendant has not paid the premium for renewing the said policies of insurance, whereby the plaintiff became liable to pay
13 the same, and has paid the same, to wit, the sum of two hundred and forty dollars, ($240.)

And whereas also the said defendant afterwards, to wit, on the first day of November, 1859, aforesaid, at the northern district of Illinois aforesaid, undertook and promised the plaintiff that if he, the said plaintiff, would prosecute John P. Chapin & Co., by suit at law, on certain debts and demands which he, the said plaintiff, then claimed to have against said firm of John P. Chapin & Co. and the said defendant, for rent of divers lots of land in the county of Fulton and State of Illinois, and recover judgments against said John P. Chapin & Co. on said debts and demands, and which amounted in all to about the sum of seventeen hundred dollars, ($1,700,) and would sue out executions on said judgments against said John P. Chapin & Co., and levy them on certain premises in the town of Liverpool, Fulton county, State of Illinois, occupied and used as and for a distillery, and more particularly described as lots four, five, six, seven, eight, and nine, in block fifty-two, in the town of Liverpool,
14 in Fulton county, State of Illinois, and expose the said premises for sale on said executions, that he, the said defendant, would attend at said sale, if the said plaintiff should not make the amount of the said judgments so to be recovered by the said plaintiff against the said John P. Chapin & Co., out of or from the said John P. Chapin & Co., and bid off said property at such sale for the full amount of the debt and costs which he, the said plaintiff, might recover against the said John P. Chapin & Co., as above described, and that he, the said defendant, would also pay the taxes levied or assessed upon said premises for the year A. D. 1859, and would pay the premiums for the renewal of two policies of insurance upon the buildings on said premises, and which were then held by the said plaintiff.

And the said plaintiff avers that, relying on said undertaking of said defendant, he commenced suit against said John P. Chapin & Co. on the aforesaid causes of action, which he claimed to have against them and said defendant, in the circuit court of Cook county, State of Illinois; and such proceedings were had in said cause, that at the November term, A. D. 1860, of said court the plaintiff
15 recovered a judgment against said John P. Chapin & Co. for

nine hundred and ten dollars ($910) damages, and twenty-six dollars and eighty cents ($26 80) for plaintiff's costs, and three dollars and fifty-five cents ($3 55) for defendants' costs of suit, on which judgment an execution was issued, dated January sixteenth, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the nineteenth day of January, A. D. 1861, and was by him levied on the said distillery property and premises by the description of lots four, five, six, seven, eight, and nine, in block fifty-two, in Liverpool, in said county of Fulton and State of Illinois, and upon the machinery, fixtures, engine, boiler. tubs, and other appurtenances in and belonging to a certain distillery, situate on the said premises, on the eighth day of March, A. D. 1861, and the said premises were by him duly advertised and exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

And said plaintiff further that he, the said plaintiff, further relying on the said promise and undertaking of the said de-
16 fendant, commenced a suit against the said John P. Chapin & Co. on the other and the residue of the aforesaid causes of action which he claimed to have against them and said defendant, in the superior court of Chicago, in the county of Cook and State of Illinois; and such proceedings were had in said cause that at the February term, A. D. 1861, of said court the said plaintiff recovered a judgment against said John P. Chapin & Co. for seven hundred and six dollars and four cents ($706 04) damages, and ten dollars and seventy cents ($10 70) costs of suit, on which judgment an execution was issued, dated February eleventh, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the fifteenth day of February, A. D. 1861, and was by him levied on the said distillery property and premises, by the description of lots four, five, six, seven, eight, and nine, in block fifty-two, in the town of Liverpool, in said county of Fulton and State of Illinois, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to a certain
17 distillery, situate on *on* the said premises, on the eighth day of March, A. D. 1861, and the said premises were by him duly advertised and exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

Of all which proceedings the said defendant had due notice, and was also reasonably notified by the said plaintiff of the time and place of sale of said premises under said two executions, as aforesaid.

Yet the said defendant, not regarding his last aforesaid promise and undertaking in that behalf, did not attend at said sale as aforesaid, although the plaintiff did not, nor could, make the amount of the said judgment so recorded by him against the said John P. Chapin & Co. out of or from the said John P. Chapin & Co., of which the said defendant had notice, nor bid off said premises, nor any part thereof, but wholly neglected and refused so to do, whereby and by reason whereof said premises were sold for, to wit, the sum of two dollars, being one dollar on each of said two executions, and by reason of the

premises the plaintiff was put to great loss, expense, and damage,
and has wholly failed to receive payment of any part of his
18 aforesaid claims and demands against the said John P. Chapin & Co., except the sum of two dollars, as aforesaid, but the same, together with large arrears of interest, remain wholly unpaid.

And the said plaintiff further avers that said defendant has never paid the taxes on said premises for the year A. D. 1859, but has wholly neglected and refused to pay them, whereby the plaintiff became liable to pay the same, with large arrears of interest therefor and subsequent taxes on said lot. And the plaintiff further says, that the defendant has not paid the premium for renewing the said policies of insurance, whereby the plaintiff became liable to pay the same, and has paid the same, to wit, the sum of two hundred and forty dollars, ($240.)

And whereas, also, on or about the first day of November, A. D. 1859, at the northern district of Illinois aforesaid, there were divers controversies and differences between the said plaintiff and the said defendant, respecting the ownership and possession of certain property in the town of Liverpool, Fulton county, State of Illinois,
19 then occupied and used as a distillery, and hereinafter more particularly described; and whereas the said plaintiff then claimed to have certain demands against the firm of John P. Chapin and company, for rent and other liabilities of the said Chapin & Co., for the use and occupation by them of the said distillery property, it was then and there mutually agreed between the said plaintiff and the said defendant, as follows: He, the said defendant, then and there undertook and faithfully promised the plaintiff that if he, the said plaintiff, would sue the said John P. Chapin and company upon the aforesaid claims and demands which he had against them, and recover judgments therefor, and sue out executions upon said judgments, and cause them to be levied upon the aforesaid distillery property hereinafter more particularly described, and expose the said property and premises for sale upon said executions, that he, the said defendant, would attend at said execution sale and bid upon said property the full amount due upon said executions at the time of such sale; and he, the said defendant, then and there further promised the said plaintiff, for the consideration aforesaid, that he would pay
20 the taxes levied or assessed upon said distillery property and premises for the year 1859; and would also pay the premiums for the renewal of two policies of insurance upon the building on said premises, which were then held by the said plaintiff.

And the plaintiff avers that he then and there accepted the promises and undertakings of the said defendant, and relying on said promises of the said defendant, he immediately commenced suit against the said John P. Chapin and company on the said causes of action which he claimed to have against them in the circuit court of Cook county, State of Illinois, and such proceedings were had in said cause, that at the November term, A. D. 1860, of said court, the plaintiff recovered a judgment against said John P. Chapin & Co. for nine

hundred and ten dollars ($910) damages, and twenty-six dollars and eighty cents ($26 80) for plaintiff's costs, and three dollars and fifty-five cents ($3 55) for defendants' costs of suit, on which judgment and execution was issued, dated January sixteenth, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the nineteenth
21 day of January, A. D. 1861, and was by him levied on the said distillery property and premises by the description of lots four, five, six, seven, eight, and nine, in block fifty-two, in Liverpool, in said county of Fulton and State of Illinois, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to a certain distillery situate on the said premises, on the eighth day of March, A. D. 1861; and the said premises were by him duly advertised and exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

And said plaintiff further avers that he, the said plaintiff, further relying on the said promise and undertaking of the said defendant, commenced a suit against the said John P. Chapin & Co., on the other and the residue of the aforesaid causes of action which he claimed to have against them and said defendant, in the superior court of Chicago, in the county of Cook and State of Illinois, and such proceedings were had in said cause, that at the February term, A. D. 1861, of said court, the said plaintiff recovered a judg-
22 ment against said John P. Chapin & Co. for seven hundred and six dollars and four cents ($706 04) damages, and ten dollars and seventy cents ($10 70) costs of suit, on which judgment an execution was issued, dated February eleventh, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the fifteenth day of February, A. D. 1861, and was by him levied on the said distillery property and premises by the description of lots four, five, six, seven, eight, and nine, in block fifty-two, in the town of Liverpool, in said county of Fulton and State of Illinois, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to a certain distillery situate on the said premises, on the eighth day of March, A. D. 1861, and the said premises were by him duly advertised and exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

Of all which proceedings the said defendant had due notice, and was also reasonably notified by the said plaintiff of the time
23 and place of sale of said premises under said two executions as aforesaid. Yet the said defendant, not regarding his aforesaid promises and undertakings, did not attend at the time and place of sale of said distillery property and premises advertised as aforesaid, nor did he bid off said property at such sale, nor pay the amount due upon said executions, but has hitherto wholly neglected and refused so to do. And the plaintiff further avers that by reason of the said neglect and refusal of the said defendant, the said distillery property and premises were sold for a nominal sum, to wit, the sum of one dollar upon each of said executions, which is all that has ever

been made or paid upon said executions. And the plaintiff further avers that the said defendant, in further violation of his aforesaid promises and undertakings, after the said executions had been levied upon the said distillery property and premises, and before the day fixed for the sale thereof under said executions, and while he well knew of such levy, wrongfully, violently, and clandestinely removed the fixtures, machinery, tools, and implements there used in and making up the said distillery establishment of great value, to wit,
24 of the value of three thousand dollars, leaving only the land or lots upon which the same stood, and the dilapidated walls of the building thereon, whereby and by reason of the premises the plaintiff has suffered great loss and damage, having wholly failed to receive payment of his aforesaid claims against John P. Chapin & Co., and been compelled to pay a large sum, to wit, the sum of seven hundred dollars taxes due upon said premises for the year A. D. 1859, and following years, and is liable to pay divers other large sums, to wit, the sum of five hundred dollars; inasmuch as the defendant wholly neglected and refused to pay the taxes on said premises for the year 1859, according to his said promise and undertakings, and also refused to pay the premiums for renewing the policies of insurance, as above stated, whereby the plaintiff became liable to pay and did pay the same, amounting to a large sum, to wit, the sum of two hundred and forty dollars.

And whereas, also, on or about the first day of November, A. D. 1859, at the northern district of Illinois aforesaid, there were divers controversies and differences between the said plaintiff and the said
25 defendant, respecting the rent, ownership, and possession of certain property in the town of Liverpool, Fulton county, State of Illinois, then occupied and used as a distillery, and hereinafter more particularly described, and whereas the said plaintiff then claimed to have certain demands against the firm of John P. Chapin & Co. for rent, and other liabilities of the said Chapin & Co. for the use and occupation by them of the said distillery property, it was then and there mutually agreed between the said plaintiff and the said defendant as follows: he, the said defendant, then and there undertook and faithfully promised the said plaintiff that if he, the said plaintiff, would sue the said John Chapin & Co. upon the aforesaid claims and demands which he had against them, and recover judgments therefor, and sue out executions upon said judgments, and cause the same to be levied upon the personal property and fixtures in and about the said distillery, and expose the said personal property and fixtures for sale upon said executions; if the same should fail to satisfy and pay the full amount due upon said executions, then, and in
26 that case, he, the said defendant, would attend at such execution sale, and bid upon said property the full amount due upon said executions at the time of such sale.

And the plaintiff avers that he then and there accepted the promises and undertakings of the said defendant, and relying on said promises of the said defendant, he immediately commenced suit against the said John P. Chapin & Co., on the said causes of action

which he claimed to have against them, in the circuit court of Cook county, State of Illinois, and such proceedings were had in said cause, that, at the November term, A. D. 1860, of said court, the plaintiff recovered a judgment against said John P. Chapin & Co. for nine hundred and ten dollars ($910) damages, and twenty-six dollars and eighty cents ($26 80) for plaintiff's costs, and three dollars and fifty-five cents ($3 55) for defendants' costs of suit, on which judgment an execution was issued, dated January sixteenth, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the nineteenth day of January, A. D. 1861, and was by him levied on the
27 personal property and fixtures in and about the said distillery, situate on the premises known and described as lots four, five, six, seven, eight, and nine, in block fifty-two, in Liverpool, in said county of Fulton and State of Illinois: that is to say, upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to the said distillery on the eighth day of March, A. D. 1861; and the said personal property and fixtures were by him duly advertised and exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

And said plaintiff further avers that he, the said plaintiff, further relying on the said promise and undertaking of the said defendant, commenced a suit against the said John P. Chapin & Co. on the other and the residue of the aforesaid causes of action, which he claimed to have against them and said defendant, in the superior court of Chicago, in the county of Cook and State of Illinois, and such proceedings were had in said cause that, at the February term, A. D. 1861, of said court, the said plaintiff recovered a judgment against said John P.
28 Chapin & Co. for seven hundred and six dollars and four cents ($706 04) damages, and ten dollars and seventy cents ($10 70) costs of suit, on which judgment an execution was issued dated February eleventh, A. D. 1861, directed to the sheriff of Fulton county, State of Illinois, for collection, and which was delivered to said sheriff on the fifteenth day of February, A. D. 1861, and was by him levied on the personal property and fixtures in and about the said distillery, situate on the premises known and described as lots four, five, six, seven, eight, and nine, in block fifty-two, in Liverpool, in said county of Fulton and State of Illinois: that is to say, upon the machinery, fixtures engine, boiler, tubs, and other appurtenances in and belonging to the said distillery on the eighth day of March, A. D. 1861, and the said personal property and fixtures were by him duly advertised and exposed for sale, under and by virtue of said execution, on the ninth day of September, A. D. 1861.

Of all which proceedings the said defendant had due notice, and was also reasonably notified by the said plaintiff of the time
29 and place of sale of said personal property and fixtures in and belonging to the said distillery under said two executions as aforesaid.

Yet the said defendant, not regarding his aforesaid promises and undertakings, did not attend at the time and place of sale of said

personal property and fixtures advertised as aforesaid, nor did he bid off said property at such sale, nor pay the amount due upon said execution, but has hitherto wholly neglected and refused so to do. And the plaintiff further avers that by reason of the said neglect and refusal of the said defendant, and by reason of the said defendant having, in further violation of his aforesaid promises and undertakings, after the said executions had been levied upon the said personal property and fixtures in and about the said distillery, and before the day fixed for the sale thereof under said executions, and while he well knew of such levy, wrongfully, violently, and clandestinely removed the fixtures, machinery, tools, and implements then used in and making up the said *up the said* distillery establishment of great
30 value, to wit: of the value of three thousand dollars, leaving only the land or lots upon which the same stood, and the dilapidated walls of the building thereon. The said personal property and fixtures so levied upon were sold for a nominal sum, to wit: The sum of one dollar upon each of said executions, which is all that has ever been made or paid upon said executions. Whereby, and by reason of the premises, the said plaintiff has suffered great loss and damage, having wholly failed to receive payment of his aforesaid claims against John P. Chapin & Co.

And whereas, also, the said defendant afterwards, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and sixty-five, at the northern district of Illinois, was indebted to the said plaintiff in the further sum of five thousand dollars of lawful money of the United States of America for the use and occupation of a certain messuage, tenements, distillery, and premises, with the appurtenances, of the said plaintiff by the said defendant, and at his special instance and request, and by the sufferance
31 and permission of the said plaintiff for a long time before then elapsed, had held, used, occupied, possessed, and enjoyed; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the northern district of Illinois aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay him the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the sum of five thousand dollars of lawful money of the United States of America for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the defendant, and at the special instance and request of the said defendant; and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and
32 then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandises of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandises at the time of the sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff aver that the said goods, ware, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of five thousand dollars of like lawful money as aforesaid, to wit,
33 at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of five thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in the like sum for the price and value of work then done and material
34 for the same provided by the plaintiff for the defendant, and at the like special request of the defendant. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of five thousand dollars of the like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, and the said defendant, in consideration thereof, afterwards, to wit, on the

35 same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, etc.,) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff, five thousand dollars, and therefore the said plaintiff brings suit, etc.

SCAMMON, McCAGG & FULLER,
Plaintiff's Attorneys.

Copy of the account sued on.

To.	Dr.
To money lent and advanced	$5,000
To money paid, laid out, and expended	5,000
To money had and received to and for the use of said plaintiff	5,000
To goods, wares, and merchandise sold and delivered	5,000
To labor, services, and material	5,000
36 To balance due on account stated	5,000
Use and occupation	5,000

Indorsed: Filed Feb'y 14, 1866.

WM. H. BRADLEY, *Cl'k.*

Demurrer.

And afterwards, to wit, on the 7th day of February, A. D. 1866, the said defendant, by his attorney, filed in said court in said cause his demurrer to the first, second, third, fourth counts of the plaintiff's declaration, in the words and figures following, to wit:

United States circuit court, northern district of Illinois, of the March term, 1866.

JOEL A. WICKER *ads.* ELY HOPPOCK.

And the said def't, by E. W. Evans, his att'y, comes and defends the wrong and injury, when, &c., and says that the 1st, 2d, 3d, 4th counts of said declaration and the matter therein contained,
37 in manner and form as the same are above stated and set forth, are not sufficient in law for the said pl'ff to have or maintain his aforesaid action against the said def't, and that the said def't is not bound by law to answer the same; and this he is ready to verify; wherefore by reason of the insufficiency of the said 1st, 2d, 3d, 4th counts of said declaration in this behalf, the said def't prays judgment; and that the said pl'ff may be barred from having or maintaining his aforesaid action thereof against him; and the said

def't, according to the form of the statute in such case made and provided, states and shows to the court here, the following causes of demurrer; that is to say—

1st. Because the said 1st, 2d, 3d, and 4th counts do not set forth any cause of action as against said def't in this, to wit, that is the 1st and 2d counts there is no consideration stated and set forth by which the def't was moved to make the proposition that is therein stated.

2d. There is no averments in said counts that said Hoppock accepted and acted upon the proposition of Wicker.

38 3d. There is no mutuality of promise, or consideration averred between the parties.

4th. There is no good and sufficient averment in said counts of the nature, amount, or character of the claims, debts, or demands, which the pl'ffs claimed to have against John P. Chapin & Co. and the def't.

5th. There is no good and sufficient averment of who John P. Chapin & Co. were, or who constituted the firm of John P. Chapin & Co.

6th. There is no averment in said counts that the debt or demands which pl'ff had ag't "John P. Chapin & Co." was lost by reason that def't did not appear at the sale of said lots, and bid them off, &c.

7th. There is no averment in said counts that John P. Chapin & Co. were insolvent at the time, &c.; or that the claim, or the amount of the demand or judgment against "J. P. Chapin, & Co." could not have been made by levy of execution upon property belonging to said Chapin & Co.

Second. Because, so far as any promise, undertaking, or agreement is set out in said 1st and 2d counts, by and between the parties in this action, the same is a mere nudum pactum, in this to wit:

39 1st. It does not appear in said counts to whom the real estate therein named, to wit: Lots, 4, 5, 6, 7, 8, and 9, in block 52, in Fulton county, belonged, nor does it appear that any party referred to in said counts had any interest in said lots, nor does it appear to whom the distillery and machinery upon said lots then belonged; and especially said counts do not show that either "John P. Chapin & Co.," or the def't, Wicker, had any interest in said real or personal property, or the pl'ff in this suit.

2d. Because so far as any averments in said counts show to the contrary, the proposition therein alleged to have been made by Wicker to pl'ff, to the effect that the pl'ff should levy upon the real estate therein named, the proposition was illegal in requiring the pl'ff to trespass upon a stranger's property; and the pl'ff was a trespasser in levying upon said lots in manner and form as stated in said counts, and promises based upon such consideration are void in law.

3d. Because it does not appear in said counts that Wicker, def't, was in anywise or manner indebted to pl'ff, or was holden or interested in the claim of pl'ff against Chapin & Co.

40 Third. 1. Because it does not appear in said counts upon

what consideration the def't, Wicker, promised to pay the taxes upon said lots or personal property for the year 1859; nor does it appear that there was any consideration received by Wicker, or any liability on him to pay said taxes; nor any reason for his paying said taxes; nor was the payment of such taxes, or the premium of insurance upon said property, so far as any averments in said counts show, for the benefit or advantage to the pl'ff; nor does it appear that either the pl'ff of def't had the least direct or indirect interest, benefit, or advantage in paying said taxes and insurance, or having the same paid.

2d. Because it does not appear in said counts how the pl'ff became liable to pay said taxes by reason of the failure of the def't to pay the same; nor does it appear that either the pl'ff or def't had any interest in, or liability for, the taxes upon said property, as neither the pl'ff or def't, or John P. Chapin & Co., by rea-
41 son of any allegations to that effect, appear to have had any interest in said property, real or personal.

Fourth. Because the 3d and 4th counts (in addition to the special causes of demurrer, above stated and set forth to the 1st and 2d counts) contain and set forth other and different causes of action than is stated in the 1st and 2d counts.

3d. Because said 2d and 4th counts show an action of trespass or case against the said def't, and not assumpsit as in the other counts of said declaration.

Fifth. Because said first, second, third, and fourth counts, in said declaration, are otherwise uncertain, informal, and insufficient.

E. W. EVANS,
Att'y for Def't.

Indorsed: Filed Feb'y 7, 1866.

WM. H. BRADLEY, *Cl'k.*

42 And afterwards, to wit, on the 19th day of March, in the March term, A. D. 1866, of said court, in the record of the proceedings of said court in said cause, appears the following entry, to wit:

ELY HOPPOCK
vs. } 458. Assumpsit.
JOEL H. WICKER.

Now come the parties by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration of the plaintiff herein, and after hearing the argument of counsel, the court not being fully advised thereon, takes time to consider.

And afterwards, to wit, on the 24th day of March, in said March term of said court, A. D. 1866, in the record of the proceedings of said court in said cause appears the following entry, to wit:

ELY HOPPOCK
vs.
JOEL H. WICKER. } 458. Assumpsit.

The court having considered and being now fully advised upon the demurrer of the defendant to the declaration of the plaintiff
43 herein, overrules said demurrer as to the first four counts of said declaration, and thereupon leave is given the defendant to plead.

And afterwards, to wit, on the 4th day of April, A. D. 1866, the said defendant, by his attorney, filed in said court, in said cause, his plea to the declaration of the plaintiff, in the words and figures following, to wit:

Plea.

United States circuit court, northern district of Illinois.

JOEL H. WICKER
ads.
ELY HOPPOCK.

And now comes the said defendant, by E. W. Evans, his attorney, and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff hath above thereof in declaring complained against him, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

E. W. EVANS, *Def't's Att'y.*

44 SIR; Please to take notice that the above-named defendant will insist upon and prove and maintain upon the trial of this cause. that the promises and undertakings in said plaintiff's declaration mentioned were made in the State of Illinois, to wit, in the district aforesaid, and that by a statute of the said State of Illinois, entitled "Statute of frauds and perjuries," it is enacted that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the promise or agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized. And the said defendant avers that the said plaintiff has brought his action for the debt of John P. Chapin & Co., and for no other purpose whatever, and that the said supposed promises and undertakings in the said plaintiff declaration specified were not and are not in writing, nor was nor is there any
45 memorandum or note thereof made as aforesaid by the said statute.

You will further take notice, that the said defendant will further insist, prove, and maintain on the trial of said cause, that the said supposed promises and undertakings in said plaintiff declaration

specified, were made in the State of Illinois, to wit, in the district aforesaid, and not elsewhere; and that by a statute of the said State of Illinois entitled "Statute of frauds and perjuries," that no action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. And the said defendant avers that the said supposed promises and agreements in the said plaintiff's declaration specified, were and are contracts for the sale of lands, tenements, and hereditaments, or some interest therein. And that the said promises
46 and agreements were not and are not in writing, nor was nor is any memorandum or note thereof made as required by the said statute. You will further take notice that the said defendant will further insist, prove, and maintain on the trial of said cause that before the making of the said supposed promises and undertakings on said plaintiff's declaration mentioned, the said defendant heretofore, to wit, on the first day of November, A. D. 1853, to wit, at the district aforesaid, had a lien upon certain goods, chattels, machinery, fixtures, engine, boiler, tubs, and other appurtenances, to a certain distillery situate and being in the town of Liverpool, and county of Fulton, in the State of Illinois, for a large sum of money, to wit: the sum of five thousand dollars, then due and owing to said defendant from John P. Chapin & Co. for money advanced to said John P. Chapin & Co., and that it was agreed by and between the said John P. Chapin & Co. and said defendant that said defendant should have and hold the possession of said goods, chattels, and property as security for the payment of said sum of money, so as aforesaid owing to said
47 defendant; and that the said defendant then and there took and held the possession of the said goods, chattels, and property, and being so in possession thereof, one Sweeney and filed in the circuit court of Fulton county, in the State of Illinois aforesaid, their bill or petition against the said John P. Chapin & Co., to establish a mechanics' lien upon the distillery, premises, and appurtenances, and for the sale of the same, and caused a summons to be issued and duly served upon the said John P. Chapin & Co., and that afterwards, to wit, on the such proceedings were had in said cause in said circuit court of Fulton county, that a decree was made therein against the said John P. Chapin & Co., which said decree ascertained and declared in substance that the sum due from the said John P. Chapin & Co. to the said Sweeney and was the sum of , and also ordered that to satisfy the said sum of money so ascertained to be due and owing from said John P. Chapin & Co., the said distillery, premises, and appurtenances should be sold, and that out of the proceeds of said sale the sum so as aforesaid
48 ascertained should be paid to said Sweeney and , and that afterwards, to wit, on the day of , 1859, the said property was sold under said *said* decretal order, and all the

said distillery property, including the machinery, fixtures, engine, boilers, tubs, and other appurtenances of said distillery, were purchased by the said defendant, Joel H. Wicker, for the sum of $1,740 70-100, and that thereafter, to wit, on the first day of March, 1861, the right of the said John P. Chapin & Co. to redeem the premises having expired, the said defendant removed the said machinery, fixtures, engine, boilers, tubs, and other appurtenances of said distillery as he lawfully might for the causes aforesaid.

E. W. EVANS, *Def't Att'y.*

Indorsed: Filed April 4, 1866.

WM. H. BRADLEY, *Cl'k.*

49 And afterwards, to wit, on the 24th day of May, in the May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

ELY HOPPOCK *vs.* JOEL H. WICKER. } 414. Assumpsit.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: W. O. Hendricks, Michael Markley, John E. Peck, Christopher Hiner, Isaac Spencer, F. A. Weir, Hammon Starr, D. St. John Mix, Sylvester Remington, sr., William Petty, Alvin Judd, and W. A. Little, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 25th day of May, in the May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

50 ELY HOPPOCK *vs.* JOEL H. WICKER. } 414. Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and, after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 26th day of May, in the May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

ELY HOPPOCK *vs.* JOEL H. WICKER. } Assumpsit.

Now come again the parties, by their attorneys, and now come also

the jury in this behalf empannelled and sworn, and, after hearing the concluding arguments of counsel and receiving the instruc-
51 tions of the court, the jury retire to consider of their verdict, and after a short absence the jury return into court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess his damage to the sum of twenty-seven hundred and sixty-three dollars and eighty cents. And thereupon the defendant moves the court for a new trial herein.

Motion for new trial.

And afterwards, to wit, on the 29th day of May, A. D. 1866, the defendant, by his attorney, filed in said court in said cause his reasons for a new trial, in the words and figures following, to wit:

Reasons for motion for new trial.

Circuit court of the United States, northern dist. Ills.

JOEL H. WICKER } *ads.* ELY HOPPOCK.

The defendant files the following reason for motion for new trial in this cause:

1st. The court misdirected the jury upon matters of law.
52 2d. The court laid down an improper rule of damages.
3d. The court refused to instruct the jury upon questions of law asked by defendant material and proper to be given in behalf of the defence.
4th. The court ruled out evidence, improperly, offered by defendant.
5th. The court admitted improper testimony in behalf of plaintiff.
6th. The verdict of the jury is against law and evidence.

E. W. EVANS,
Att'y for Def't.

Indorsed: Filed May 29th, 1866.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 12th day of June, in the May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

ELY HOPPOCK } *vs.* } Assumpsit.
JOEL H. WICKER.

53 Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, heretofore entered herein by his attorney for a new trial of this cause, and, after

hearing the arguments of counsel, the court not being fully advised upon said motion, takes the same under advisement.

And afterwards, to wit, on the 23d day of June, in the May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

ELY HOPPOCK
vs.
JOEL H. WICKER. } Assumpsit.

Now come the parties, by their attorneys, and the plaintiff, by his attorney, enters a remittitur upon the finding of the jury heretofore entered in the sum of five hundred and fifty-six dollars and sixty-seven cents for insurance and taxes, and thereupon the court having considered, and being now fully advised upon the motion of the defendant, heretofore submitted for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that the said plaintiff do have and recover of the said defendant the sum of
54 twenty-two hundred and six dollars and forty-one cents, the amount of the damages aforesaid assessed less the remittitur entered herein, together with his cost and charges by him about his suit in this behalf expended, amounting to the sum of sixty dollars and thirty-five cents, and that he have execution therefor.

55 *Bill of exceptions.*

On the trial of said entitled cause the following exceptions were made and allowed, to wit:

In the circuit court of the United States for the northern district of Illinois.

ELY HOPPOCK
vs.
JOEL H. WICKER.

Be it remembered, that afterwards, to wit, on the 24th day of May, A. D. 1866, at a circuit court of the United States for the northern district of Illinois, held in the United States court room in the city of Chicago, in said district, before the honorable Thomas Drummond, one of the circuit judges appointed to hold the said court, according to the statute in such case made and provided, the aforesaid issues, so joined in this cause between the respective parties thereto, came on to be tried by a jury of the district aforesaid, for that purpose duly empanelled, good and lawful men, of the said district; at which time came then, as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury afore-
56 said empanelled to try the said issues, being called, also came, and were then and there in due manner chosen and sworn to try the said issues. And upon the trial of the said issues the counsel for the said plaintiff, to maintain and prove the said issues on his part, read in evidence the deposition of Ely Hoppock, the plaintiff

in this cause, in which deposition the said Hoppock testified that he went to Liverpool, Fulton county, in the State of Illinois, where the distillery property in controversy was situate, in the month of November, A. D. 1859; that at that time he held a mortgage on said distillery property, which amounted to between twelve and thirteen thousand dollars, besides interest, which mortgage covered the lots upon which the distillery stood and some other property; that he had agreed with Messrs. Caldwell & Boyington, the mortgagors, and with John P. Chapin & Co., their lessees, that he would not disturb the said John P. Chapin & Co., their tenants, in consideration of their agreeing to pay to him the sum of $445, on account of the interest upon his mortgage upon the distillery property, say
57 $6,500, and pay the taxes and insurance on the property under a lease of three years, from July 1st, 1857, to July 1st, 1860, which agreement was made by him when said Caldwell & Boyington leased said distillery to said Chapin & Co.; that he, plaintiff, met the defendant, Joel H. Wicker, at Liverpool aforesaid, on the 24th day of November, A. D. 1859; that said Wicker was then in possession of said distillery, and was running the same, and claimed to have an interest in the property, under a purchase under a proceeding to enforce a mechanics' lien, as he (pl'ff) then understood, and an assignment of said lease; that he had some negotiations with said Wicker on that day in the office of the said distillery. Said plaintiff testified: "I wanted him to pay the rent due upon the lease from Caldwell & Boyington to Chapin & Co., under their agreement with me, from the 1st day of July, 1857. He finally proposed to do so if I would obtain a judgment for the amount of the rent against Chapin & Co., and levy upon and sell the machinery and fixtures of the distillery, which he proposed and offered to bid for to the amount due to me by the lease and agreement. I did not
58 agree to his proposal, but said I would do so if there was no legal objections, and proposed to meet him at the office of Mr. Gondy, in Chicago, on the Monday or Tuesday following, whom I proposed to consult on the subject, and whose advice I said I would take on the matter. We had some further conversation about a proposal on my part to sell to him the whole of my interest and claim upon the property; but we did not make any bargain or agreement except what I have above stated. I did meet Mr. Wicker after that interview, in pursuance of our appointment, at the office of Mr. Gondy, in Chicago, on the Monday or Tuesday following, the 28th or 29th of November, 1859." Plaintiff further testified: "I did make an agreement with Mr. Wicker, the defendant, at the office of Mr. Gondy, in Chicago, on the 28th or 29th of November, 1859; there was no one present I think except Mr. Wicker, Mr. Gondy, and myself. I claimed from Mr. Wicker the rent of the distillery from July 1st, 1857, at $455 per annum, and the taxes and insurance pursuant to the lease, and my agreement under which the lease was made
59 that the rent should be paid to me on the lease, in consideration of my agreeing not disturb the lessees, if they paid me, until the end of the lease. Mr. Wicker said he thought he was only

liable from the preceding April when he took possession, but finally proposed, as he had previously done at Liverpool, that if I would obtain judgment for the two years' rent already due, and when the next year's rent came due for that also, and levy upon the fixtures and machinery in the distillery, he would bid for the same the whole amount due to me, and would also pay the taxes and insurance as agreed in the lease. I consulted Mr. Gondy, and finally agreed to this proposal, and directed Mr. Gondy to go on and obtain judgment for the rent due and to become due, and to carry out the agreement on my part. During that conversation Mr. Wicker claimed to be in possession of the distillery under a mechanics' lien decree, and also as an assignee of the lease to Chapin & Co., and I claimed that he was bound by their agreement to pay to me the whole rent from the date of the lease as agreed upon by Chapin & Co."

60 Upon cross-examination in said deposition, said plaintiff testified as follows, to wit: "I have already stated all I know respecting Mr. Wicker's interest in the distillery. He claimed to represent the interest of J. P. Chapin & Co., under their lease. The distillery was located upon lots 6, 7, 8, and 9, of block No. 52, in the village of Liverpool. The real estate was owned originally by Lorenzo Caldwell and Underhill Boyington, and mortgaged by them to me, and was leased by them to John P. Chapin & Co., in July, 1857, for three years, under an agreement on my part, in consideration of their agreement to pay the rent to me. That I would not dispossess them under my mortgage for the three years, if they paid the rent to me and paid the taxes and insurance. I gave a stipulation to that effect in writing to Mr. Caldwell, to be delivered to Mr. Chapin when he executed the lease, but in whose possession it is now I do not know. I had no request from Mr. Wicker to levy upon any lots in Liverpool. I never knew that John P. Chapin & Co. had any lots in Liverpool. I never knew that they had any interest except in the lease I have mentioned, and in the machinery and fixtures in
61 the distillery which Mr. Wicker wished me to levy on, and which he afterwards removed."

The counsel for said plaintiff thereupon introduced and read in evidence the lease referred to in said deposition of said plaintiff, which lease was as follows:

This indenture, made this first day of July, 1857, between L. Caldwell and U. Boyington, of Liverpool, Fulton county, Illinois, parties of the first part, and John P. Chapin & Co., of Chicago and Liverpool, Ills., of the second part, witnesseth that the said parties of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said parties of the second part, their executors, administrators and assigns, have demised and leased to the said parties of the second part all their premises situated, lying, and being in the village of Liverpool, in Fulton county, Ills., to wit, lots 6, 7, 8, and 9, in block No. 52, and lots No. in block No. 57, in said village of Liverpool, with the buildings upon the same; with the privilege at the expiration of the

term of removing all the improvements put upon by the par-
62 ties of the second part, of any and every description, to have and to hold said premises with the appurtenances unto the parties of the second part, their heirs, executors, administrators, and assigns, until the first day of July, 1860; and the said parties of the second part, in consideration of the leasing of said premises aforesaid by the said parties of the first to the said parties of the second part, doth covenant and agree with the parties of the first part, their executors and assigns to pay the said parties of the first as rent for said demised premises the sum of four hundred and fifty-five dollars ($455) per annum, payable annually; Ely Hoppock, of the city of New York, being interest upon a certain mortgage to him upon said property; and the said parties of the second part further covenant and agree, with the said parties of the first part, to pay the insurance and all taxes on said premises, and at the expiration of said lease mentioned they will yield up the said demised premises to the said parties of the first part in as good condition as when the same
63 were entered upon by the said parties of the second part; loss by fire, or inevitable accident, ordinary wear and tear excepted. It is further agreed at the expiration of said lease, by the parties of the second part, that all removals of timbers and floors shall be replaced in as good condition as when they took possession of said premises.

(Signed) L. CALDWELL.
(Signed) U. BOYNTON.

The said counsel for said plaintiff then called as a witness William C. Gondy, who, being duly sworn, testified that he knew the said distillery property; that the plaintiff and defendant had an interview at his office in Chicago, in the month of November, 1859, at the time mentioned in the deposition of said Hoppock. The witness further testified, as follows:

Mr. Hoppock and Mr. Wicker came into my office and stated certain facts in regard to the distillery property in Liverpool, the manner in which it was held, and produced a lease which was submitted to me at the time. (The lease read in evidence was here shown the witness.) This is the same paper that was produced.

64 Wicker brought it with him to the office. This lease was submitted to me, and certain facts were stated in regard to it—in regard to the parties in this case, Wicker and Hoppock. It appeared from the lease, and was so stated by the parties, that the rent was to be paid, by the tenant, to Hoppock. It was also stated that Wicker was in the possession of the property and occupying it as assignee, or in some way under John P. Chapin & Co., and had been so occupying it from the preceding April—April, 1859. It was then stated to me by one or the other of the gentlemen, I don't remember which, that a question existed between them as to how much rent Wicker was liable for. Wicker admitted that he was liable for the rent, complying with the terms of the lease, on the part of the tenant from the preceding April, from the time he had been in actual

possession, but denied his liability for rent prior to that time; it was also stated that nothing had been paid on the lease from the beginning—the commencement of July, 1857. Hoppock claimed Wicker
was liable from the beginning of the term specified, from all
65 the stipulations and covenants in the lease, and my opinion was asked as to that question. My recollection is, I did not give an opinion about it. Had some doubts about it, I think, but was about to state that I must examine the question, perhaps did state so, when I was interrupted by one of the parties, I think it was Wicker, saying it was, perhaps, immaterial about the question, because he was willing, on his part, if Hoppock would proceed and get judgment upon this lease and the covenants in it against John Chapin & Co., first for the two years then due, and when the third year matured, upon that issue executions and levy them upon the property at Liverpool, that he would bid off the property for whatever the judgment and costs might be. It was the property described in the lease. I think I had the lease in my hand at the time, and also to pay the taxes for the then current year of 1859, which he admitted himself liable for, as I understood it, and renew two policies of insurance then existing on said property, and to expire within a short time afterwards. The conversation resulted in Hoppock assenting to the proposition, saying
66 he was willing to go on if there was no legal objection. I told him I saw none. Wicker left the lease in my possession, and Hoppock employed me to go on and prosecute the judgments, and left the policies with *with* directions to see they were renewed, and the premiums paid by Wicker. The question has been asked with regard to the particular property. I may say, with regard to it, that I knew exactly the situation of this property, for before I came to Chicago I conducted some legal proceedings in regard to it in Fulton county, where it was situated, and had been there and seen it, and they knew that I knew it. I cannot say they designated particularly the property one way or the other, more than it was designated as the property we were talking about and described in the lease; and that I knew at the time that the property consisted of some lots, I believe in block 52, in the town of Liverpool, and the fee of which was in Boynton, I think, or in Cadwell and Boynton, on which Hoppock had a mortgage, which he was then foreclosing. That it
67 had been leased by Cadwell & Boynton to Chapin, and Wicker had made a purchase of Chapin's interest, under a mechanics' lien. I had procured the lease and knew the facts, and they knew I knew that; I think they were referred to in the conversation. I don't know that they were repeated over, but these facts, within my knowledge, with the facts already stated, was what they first proposed to submit to my judgment, about what their rights were; that is the substance of the conversation, I believe, at that time. The leases was left with me, and I commenced suit immediately.

The witness further testified that judgments were obtained against Chapin & Co., and levies made, and the day of sale fixed by agreement with Wicker, at about the 20th of April, 1861; but before day of sale proceedings on the judgments was enjoined by a chancery suit

commenced in superior court of Chicago, by a Mr. Price, against Hoppock and Wicker, and the sheriff of Fulton county, who had the executions, and other parties. That some time in the latter
68 part of the summer of the same year, the injunction was dissolved, or Hichcock, solicitor for complainant, notified him that he might proceed, and he directed the sheriff to proceed and advertise and sell, and the time of sale was fixed for the 9th of September, 1861; (a paper was here shown witness,) and he testified this is a copy of the notice served upon Mr. Wicker of the sale. This notice witness prepared, and handed it to his clerk, Mr. Chandler, and directed him to serve it on Mr. Wicker.

Witness further testified that he had a conversation with Mr. Wicker a few days before the date of said notice, in regard to it. That he called upon him at his office to give him a verbal notice of this sale to come off on the 9th of September. It was either after the date was fixed, or he called to have him name a day. In this conversation Wicker said he would not do anything about it. That he was under no obligation to bid the property off. That the distillery fixtures had been removed from Liverpool up to Chicago, and it was no benefit to him. That he then stated to Wicker what he understood the agreement to be. That he had agreed to bid off this
69 property whenever Hoppock obtained judgment, and levied on the property for the amount of the judgment. That Wicker sat and thought a minute and said, "Very well, go on and give your notice, and I will bid them off." That in consequence of Wicker's apparent reluctance, witness prepared and caused to be served on him this written notice. Witness directed the sheriff that in case no bid was made, to strike off the property at a nominal sum to the plaintiff. The first suit was defended, which caused delay, but no time was lost in prosecuting it. (In this connexion the counsel for the plaintiff introduced in evidence the files of the chancery suit mentioned by the witness. It was a bill in chancery, filed in the superior court of Chicago, on the 25th day of February, A. D. 1861, wherein Benjamin M. Price was complainant, and John P. Chapin & Co., and said plaintiff Hoppock and the defendant Wicker, were defendants.) Witness further testified: That the defendant Wicker in the conversation at his (witness's) office in November, 1859, at the time this agreement was made, stated that he had some arrangement with
70 John P. Chapin & Co., by which, if he bid off said property as proposed, he had a right to do it and to obtain reimbursement from them in some way. I did'nt then know what the arrangement was, but he stated that he had some arrangement with them.

On cross-examination the witness testified in relation to his interview with Wicker, in relation to attending the sale and bidding off the property, as follows: He (Wicker) said he did not intend to bid off the property. That he had no interest in it. That it would not do him any good. That the fixtures and distillery property had been removed from Liverpool to Chicago. That he had brought them up here, and was using them in the northwest part of the city, and therefore it would be no benefit to him, and he would not do so. I then re-

peated to him what I understood to be the agreement that had been made in my office. My recollection is that I stated to him, in substance, that he had agreed to bid off this property, provided Hoppock would obtain judgments, and procure his execution and levy on the property, and that he was under obligations to do what he
71 promised in fulfilment of that agreement. I recollect that conversation very distinctly. He sat a moment and said, "Very well, go on and make the sale, and I will bid off the property." That was in August, 1861.

The counsel for said plaintiff in connection with testimony of said witness, introduced the record and files, and executions and sheriff's returns thereon, in the suits against John P. Chapin & Co., for recovery of the rent, by which it appeared that the first suit was commenced on the 13th day of December, 1859, and judgment was obtained thereon on the 3d day of December, 1860, for $910 00 damages, and $29 35 costs. The second suit was commenced on the 23d day of November, 1860, and judgment was obtained thereon by default on the 7th day of February, 1861, for $706 04 damages, and $10 70 costs. The first suit was in the circuit court of Cook co., Illinois, and the second suit was in the superior court of Chicago. The executions issued upon these judgments are in due form of law. The execution upon the first judgments bears date January, 16th, 1861, and the certificates of levy and sale indorsed thereon by the sheriff are as follows:

72 "STATE OF ILLINOIS, *Fulton County:*

"By virtue of the within execution and fee bill, I, Asaph Perry, sheriff of said county of Fulton aforesaid, have levied the same upon lots 4, 5, 6, 7, 8, and 9, in block 52, in Liverpool, in said county, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances, in and belonging to a certain distillery, situate on the said premises and being the only distillery in said town of Liverpool, as the property of the within defendants, on this 8th day of March, 1861.

"A. PERRY,
Sheriff of Fulton County."

"I certify that I sold the property levied on by virtue of this execution to Ely Hoppock, for the sum of one dollar, that being the highest bid, on the 9th day of September, 1861, after having advertised the same according to law.

"A. PERRY,
Sheriff of Fulton Co., Illinois.

The execution on the second judgment bears date February 11th, 1861, and the certificates of levy and sale indorsed thereon by the sheriff are as follows:

73 "STATE OF ILLINOIS, *Fulton County:*

"By virtue of the within execution, I, Asaph Perry, sheriff of said county, have levied the same on lots 4, 5, 6, 7, 8, and 9, in block

52, in the town of Liverpool, in said county, and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances in and belonging to a certain distillery, situate on the said premises and being the only distillery in said town as the property of the within defendants, on this 8th day of March, 1861.

"A. PERRY,
Sheriff of Fulton Co., Ills."

"I certify that I sold the property levied on by virtue of this execution to Ely Hoppock for the sum of one dollar, that being the highest bid on the 9th day of September, 1861, after having advertised the same according to law.

"A. PERRY,
Sheriff Fulton County, Ills."

The witness, Gondy, also testified that he was in Lewiston, Fulton county, at the time these levies on these executions were made, and directed the sheriff what to levy upon, and at his request
74 wrote out the levies which the sheriff signed at the time. He also testified that he directed the sheriff, in case no bid was made, to strike off the property levied upon to the plaintiff for a nominal sum.

The counsel for the plaintiff then called as a witness George Chandler, and the notice mentioned by the witness Gondy was shown to him, and he testified that on the 3d day of September, 1861, he, by direction of said Gondy, served on the defendant, Wicker, said notice, by delivering to him a copy thereof at his office in Chicago on that day. The counsel for said plaintiff then introduced and read in evidence said notice, which was as follows:

CHICAGO, *Sept. 2d*, 1861.

E. H. Wicker, esq.:

SIR: The Liverpool distillery property is now advertised for sale by the sheriff of Fulton county, under the executions from Cook county, in favor of Hoppock *vs.* Chapin, Hurlburt, and Campbell. The sale to be at the court house in Lewiston, September 9th inst. I send you this notification that you may bid off the prop-
75 erty in accordance with your agreement with Hoppock for the debt, interest, and costs. In case you fail to bid off the property, Mr. Hoppock will pursue such other legal means as he has to compel the payment of such judgments or the rent for which they were rendered.

Respectfully,

W. C. GONDY,
Att'y for Hoppock.

Testimony was introduced by said plaintiff in support of his claim to recover for insurance and taxes; but the same is here omitted, being immaterial, as the items for each account were remitted by him from the verdict. The plaintiff here rested his case, and the defendant's

counsel, to maintain and prove the issues on his part, introduced and read in evidence the following instruments of writings or agreements, namely:

Articles of agreement indented, made, and concluded, this sixth day of December, A. D. 1858, between Chapin, Hurlburt & Co., of the city of Chicago, in the county of Cook, and State of Illinois, party of the first part, and Joel H. Wicker, of the said city of Chicago, party of the second, witnesseth:

76 Whereas the said party of the first part are the owners and in possession of a certain distillery, with all the necessary appurtenances, situated in the town of Liverpool, in the county of Fulton, and State aforesaid, upon which said distillery and its appurtenances they, the said party of the first part, have expended heretofore the sum of twenty-five thousand dollars, and whereas they, the said party of the first part, have not the necessary means to put the said distillery into successful operation: Now, therefore, in consideration of the covenants and agreements hereinafter mentioned, to be kept, done, and performed by the said party of the second part, they, the said party of the first, covenant and agree to put into the said distillery a suitable cornsheller, and to build in addition to the pens which are now attached to said distillery a sufficient number of proper pens to properly contain all the hogs which may be purchased by the party of the second part, and fed at the said distillery; and also to put in good repair a rollway extending from the said distillery to the Illinois river, and also to complete and put

77 in good condition an office building belonging to said distillery and now nearly completed, and also to provide proper and sufficient grounds connected with the said distillery for the full and ample prosecution of all the branches of business connected with the said distillery; and the said party of the first part, for the consideration mentioned aforesaid, further covenants and agrees to and with the said party of the second part, to let to the said party of the second part the aforesaid and described distillery with all the appurtenances and the additions to made as aforesaid, for the following term of time, to wit: from the twentieth day of December, instant, for, during, and until the first day of December, A. D. (1860,) eighteen hundred and sixty, and also to furnish a suitable person, who is to be one L. Cadwell, at their own hire and expense, to assist in the general business of the distillery, and look after and have the care of buildings of the party of the first part, at a rent, the amount of which is to be contingent and depend upon the success of carrying on the said distillery by the said party of the second part; and the said party of the *of the* second

78 part, in consideration of the aforesaid covenants and agreements to be kept, done, and performed by the said party of the first part as aforesaid, covenants and agrees to and with the said party of the first part, to furnish and invest in carrying on the aforesaid distillery a sum of money necessary for carrying on the said distillery, not to exceed in all the sum of twenty thousand dollars,

and also shall furnish a book-keeper and cashier, at his own hire and expense; and the said party of the second part further covenants with the said party of the first part, that he will pay for the use of the aforesaid distillery, with its appurtenances and fixtures to be made as aforesaid, the following described contingent rent, that is to say, that for and during the term aforesaid, periodical settlements of the business of the concern shall be made as often as about once in four months; when any lot of hogs or cattle fed at said distillery shall have been sold, and the profits or loss of the business shall be determined, and after the entire payment of all expenses, the said party of the second part, if there be any profit made, shall pay as
79 rent for the aforementioned distillery, one-half of said net profits to the said party of the first part, but in case there shall be a loss, then the said party of the first part shall receive no rent up to the time of such settlement from the party of the second part; and the said party of the first part, for the consideration first aforesaid, hereby covenants and agrees to pay one-half of all such losses as shall be determined by such settlements so to be made by the said party of the second part as aforesaid, during the term aforesaid. And it is further covenanted and agreed by and between the parties to this instrument, that in case the exigencies of the business may demand, and the said party of the second part should put into the business of said distillery any sum over and above the aforesaid sum of twenty thousand dollars, the said party of the first part shall, in addition to the rent and use of the aforesaid distillery and its appurtenances, pay to the said party of the second part interest upon such sum so advanced over and above the twenty thousand dollars aforesaid, at the
80 rate of ten per cent. per annum, and in case the said party of the second part should not invest the whole of the twenty thousand dollars in the distillery aforesaid, as aforesaid, then, and in that event, it is further covenanted and agreed between the parties to this instrument that the said party to the second part shall, in addition to the contingent rent mentioned to be paid as aforesaid, pay to the said party of the first part interest upon such sum so wanting at the rate of ten per cent. per annum. And it is further covenanted and agreed by and between the parties to this instrument, that the stock of lumber, grain, hogs, and casks that may be on hand at the time the said party of the second part shall enter upon and take possession of the said distillery and its appurtenances, shall be taken at their actual cost by the party of the second part. And it is further agreed between the parties to this instrument, that all accidents of every kind, and damage by fire or flood to the said distillery and its appurtenances, during the term aforesaid, shall be at the risk of the said party of the first part. It is further agreed, that whereas
81 the parties of the first part have invested in said distillery twenty-five thousand dollars, and if said Wicker does not invest a like amount in money, he is to pay to the first party interest at ten per cent. per annum on the difference between the amount invested by him in money and the twenty-five thousand dollars.

In testimony whereof we have subscribed our names and affixed our seals the day and year first above written.

(Signed) CHAPIN, HURLBURT & CO. [L. S.]
J. H. WICKER. [L. S.]

Attest: ALEXANDER MILLER.

Memorandum of an agreement made and entered into this twelfth day of August, in the year of our Lord one thousand eight hundred and fifty-nine, between Joel H. Wicker, of the city of Chicago, in the county of Cook, and State of Illinois, of the first part, and John P. Chapin & Co., of the same place, of the second part:

Whereas the said Joel H. Wicker is the owner and in the possession of certain real estate situated, lying, and being in the town of Liverpool, in the county of Fulton, and State aforesaid, described in a deed from Henry L. Bryant, master in chancery, to the said
82 Joel H. Wicker, dated the sixteenth day of April, A. D. 1859, and duly recorded in the recorder's office, at Lewiston, in said county of Fulton, on the 16th day of April, A. D. 1859, aforesaid, in vol. 47, page 282, of the land records, to which deed reference is had for a full description of the said estate, and of the appurtenances thereunto belonging, which said real estate and the appurtenances thereunto belonging, they, the said John P. Chapin & Co., are desirous of obtaining, and whereas also the said John P. Chapin & Co. are now indebted to the said Joel H. Wicker upon two drafts drawn by the said John P. Chapin & Co. upon the said Joel H. Wicker, and by him accepted, one for eighteen hundred ($1,800) dollars, payable in New York city on the 13th day of August instant, and the other for the sum of fifteen hundred and thirty-three ($1,533) dollars, due and payable in the month of September next.

Now, therefore, this indenture of agreement witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be done and performed by the said parties of the second part, hereby covenants and agrees
83 to and with the said parties of the second part and their legal representatives, that he, the said party of the first part, will, upon the full payment to him of the amount of the notes aforesaid, or the full discharge of the said notes, and the payment of the same by the said parties of the second part or their legal representatives, execute and deliver a quit-claim deed of the title and interest of him, the said party of the first part, to the said real estate and appurtenances so described as aforesaid, to the said parties of the second part, and the said parties of the second part hereby covenant and agree to and with the said party of the first part and his legal representatives that they, the said parties of the second part, will pay unto the said party of the first part the two notes described aforesaid, and fully discharge the same according to the tenor, effect, and true meaning of the notes aforesaid.

In witness whereof we have hereunto set our hands and seals the day and year first aforesaid.

(Signed) J. H. WICKER. [SEAL.]
JOHN P. CHAPIN & CO. [SEAL.]

Signed, sealed, and delivered in the presence of—
CHAS. ROBB.

84 Whereas, on the 25th day of January, A. D. 1860, the said party of the first part, Joel H. Wicker, with the aid of his brother, Charles G. Wicker, has accepted the further draft of the party of the second part, John P. Chapin & Co., for the renewal of the same indebtedness mentioned and described in the above instrument, which now amounts, with exchange, &c., to the sum of thirty-five hundred and sixty-seven $\frac{72}{100}$ dollars, the aforesaid draft being dated January 25th, 1860, for the above sum, and payable to the order of John P. Chapin in six months after date: Now, therefore, it is expressly agreed between the said Joel H. Wicker and John P. Chapin & Co., that in case the said John P. Chapin & Co. shall fail to save the said Charles G. Wicker and Joel H. Wicker free from all damages and costs of every name and nature, by reason of their accepting the draft aforesaid, or to pay the same at maturity, then, and in that case, the said John P. Chapin & Co. shall forfeit all their title in law or equity to the machinery, still, and engine situated in Liverpool, in the county of Fulton, and State of Illinois, and referred to in the above instrument; otherwise the above instrument to remain in force.

85 Witness our hands and seals this 25th day of Jan'y, A. D. 1860.

(Signed) JOHN P. CHAPIN. [SEAL.]
F. J. HURLBURT. [SEAL.]
L. C. CAMPBELL. [SEAL.]
J. H. WICKER. [SEAL.]

Whereas on this 21st day of July, A. D. 1860, the said party, Joel H. Wicker and John P. Chapin, has given their promissory note for the sum of thirty-five hundred sixty-seven 71-100 dollars, payable six months after date to the Cheshire County Bank of Keene, New Hampshire, for the benefit of the said John P. Chapin & Co., or Chapin Hurlburt & Co., for the renewal of the same indebtedness described in the above-mentioned instrument. Now, therefore, it is expressly agreed between the said Joel H. Wicker and the said Chapin, Hurlburt & Co., that in case the said Chapin, Hurlburt & Co., or their assigns, shall fail to save the said Joel H. Wicker free from all damages and costs, by reason of giving the said note, or shall fail to pay or provide for said note, that then and in that case the said Chapin, Hurlburt & Co. shall forfeit all claim or title in law or equity to the machinery, still,

86 and engine situated in Liverpool, in the county of Fulton and State of Illinois, referred to in the above instrument; otherwise, the above instrument is to remain in force. And it is further agreed that the said Wicker shall be indemnified against all claims

that may or have originated as rents, taxes, or half losses during the term said *said* Wicker has occupied said distillery, before they shall be entitled to a deed for the property mentioned in the aforesaid instrument.

Witness our hands, this 21st day of July, 1860.

(Signed) J. H. WICKER. [SEAL.]
JOHN P. CHAPIN & CO. [SEAL.]

And the counsel for said defendant, further to maintain said issues, called as a witness Alexander Miller, who, being duly sworn, testified: That he was present at a conversation between plaintiffs and defendant in the office of the distillery, in Liverpool, Fulton county, Illinois, in November, 1859; himself and Mr. Snyder and plaintiff and defendant were the only persons present. In relation to said interview the witness testified as follows: Hoppock came there, he said,
to see us about collecting some rent or something from the
87 distillery property. Wicker said he didn't suppose he was responsible for any rent except while he was occupying the premises; he said that the property was not in order or repair, and that he didn't want to pay any rent until it was put in order; it was out of order, so as not to be tenantable; it rained in every time it rained, right through, and he didn't want to pay out until the building was put in order; he told Mr. Hoppock, however, if he would go on and get judgment against Chapin & Co., and could not make his money out of any other property, if he would levy upon the distillery and fixtures, he would bid them off for the amount of the execution; Hoppock said he would do that, and go to Lewiston that afternoon and have the judgment in the suit started; he was on his way then to Lewiston to see his attorneys.

The witness further testified that the agreement was to levy not upon the lots, but upon the machinery. He further testified that in the fall of 1859 Chapin & Co. had at Liverpool four hundred and twenty (420) hogs, and fifty or sixty (50 or 60) barrels of high wines;
a canal boat worth $2,500. This property remained at Liver-
88 pool till the spring of 1860; they also had a boat load of lumber at Pekin, about 18 miles distant.

Witness, on cross-examination, testified that Wicker, as a reason why he desired the levy to be made, said that if they got a judgment and levied, he thought perhaps there would be enough to pay Hoppock as well as himself; he claimed at the time that Chapin & Co. owed him, and that he had taken possession of the property for the purpose of securing this indebtedness of Chapin & Co. to him. He further testified that when Wicker spoke of levying on the property of Chapin & Co., they mentioned as such property the machinery (in the distillery) and the fixtures, vats, &c. The witness testified that all the personal property which he had spoken of as belonging to Chapin around the distillery, in the fall of 1859, was removed from there during the winter and spring of 1860, except the lumber at Pekin.

The counsel for said defendant also called as a witness Wm. H.

Snyder, who being duly sworn, testified: That he was present
89 at the interview between the plaintiff and defendant at Liverpool, in November, 1859; that the conversation between Hoppock and Wicker was a pretty long one. All the way through Hoppock wanted Wicker should buy his claim that he had upon the premises, but Wicker refused to do it, and didn't want anything to do with the building or the real estate; but he agreed with Hoppock that if he would reduce his claim to judgment and levy upon the machinery, if it could not be collected in any other way, he would bid it off for the amount of the judgment.

The witness further testified that he removed the machinery and fixtures of the distillery for and by direction of Wicker, in August, 1861, from Liverpool to Chicago; such removal was made in steamboats and barges, which arrived at the landing for that purpose on Saturday night, and left on the Monday morning following.

The counsel for said defendant then called as a witness the said Joel H. Wicker, defendant, who being duly sworn, testified: That
90 he recollected the interview between himself and Hoppock in November, 1859, distinctly. The witness said: We had two or three interviews at the premises; we had one at the office, and one at the house where he put up.

Hoppock appeared to be anxious to get the rents, that appeared to be what he was after, out of Chapin & Co.; he was trying to find out how he could get them, and advised with me, or was advising with me, how he could get hold of something to get his rents. I told him I thought he could collect his rents, as Chapin & Co. had stuff always had laying around the distillery, and if he tried he could get his rents yearly as it became due. When I went there they had high wines, hogs, lumber, and various things lying about. It appeared from what he said that he never tried until 1859 to get any rents from them. We had several talks in regard to the matter, and he was anxious to get hold of property. It appears there was some property he didn't own, and couldn't own, and didn't control, and had nothing to do with. He wanted to work with me some way, so
that we could work together; that is, he wanted to get it in
91 some shape to have the property kept up, the building kept in repair, and to have me keep running there. The building was in bad order, and I was bothered to run it any way, or do anything with it. He said he couldn't repair it because he didn't own it, and the other parties that owned it wouldn't repair it, and things looked pretty badly all around. In a distinct conversation that I had with him in talking about collecting his rents of J. P. Chapin & Co., I told him that, I think in the first place, he wanted me to stay there. I was talking about trying to get away and get out of it, and he urged me to stay and occupy the premises until he could get a title to it; he wanted me to buy his interest in fact. The conversation was various, but I objected to buying or having anything to do with it in whatever conversations I had with him. I know at the time my title to the property was not fully consummated, and my impressions were that if he got judgment, I think I told him that if he would go to

work and get judgment against Chapin, Hurlburt, and Camp-
92 bell, if he couldn't collect, if I couldn't show him some prop-
erty to collect his rent, he might go on and attach for the machinery, and I would bid it off at the amount of the debt, which would give me more title in the machinery. I think that was the object in both working at it at the time.

Q. What did he say to that?

A. He agreed to get judgment against them, to proceed, and I was to render any assistance; he rather wanted me to help him through with the matter.

Q. When was he to proceed? Was anything said about that?

A. He was to proceed right off at once and get judgment as soon as he could, for I didn't know but what some other claims would come up and get ahead, or but what Campbell and Hurlburt would procure it and get it out of my hands. They had a right of redemption any way, and he understood that as well as I did. We argued that if they did redeem it, the judgment would hold good any way, and it was better for him to get his judgment immediately.

93 Q. Did he determine then to do it, or did he talk about consulting Mr. Gondy?

A. I think he said he would go to Lewiston and see Bond and Janes before he came to Chicago. He didn't know whether he would commence the suit at Lewiston or here; didn't determine, I think, there; at any rate, I was to see him in Chicago. Another point that we had up there was about the lease. The lease was about to expire, and I wanted to know how I was to hold on when they were fighting about the lease, and nobody would fix it up or lease it. He said he didn't know whether he could lease it, but he would see his attorneys and let them know. He spoke of taxes and insurance.

Q. What was said about them?

A. I told him, I think, if the premises would be got in shape in tenantable order, I would pay taxes and insurance. I wanted things got in some shape so that I would know what I was doing. That is about my recollection of that.

Q. Did you subsequently talk this matter over at Gondy's office, when Gondy and Hoppock were present?

A. We met there for the purpose; he was going to give
94 me his answer about the lease. I think the question was brought up whether I was liable for rent prior to my going in. I claimed that I was not liable for rent, that I had no lease or assignment of a lease.

Q. You got in under the agreement with Chapin & Co.?

A. Yes, sir. I didn't know how the thing did stand until Hoppock come up,—how the premises did stand.

Q. What was said in Gondy's office?

A. The most of our conversation related to getting this judgment. I think he wanted the lease, and I went to Chapin and got the lease and gave it, I think, to Gondy, or I had it with me. I think I had to go and get it of Chapin.

Q. What was said about getting judgment and bidding off property in Gondy's office?

A. I think about the same as in Liverpool.
Q. Was anything different said?
A. Nothing, to my knowledge.
Q. The arrangement was merely alluded to in Gondy's office?
A. It was alluded to there, and it was concluded to carry it out; to get the judgment as soon as possible. It was concluded to
95 let him prosecute as soon as possible.

Q. Was anything said about the disposition at the sale of Chapin & Co.'s interest in anything but the fixtures? Anything said in Gondy's office?

A. Nothing was said about anything else than the machinery and fixtures.

Q. Was anything said about levying on the lots and real estate?

A. The lots were not mentioned to my knowledge. That in said interview Hoppock appeared to be anxious to get his rent out of Chapin & Co., and wanted to work with witness some way so that they could work together. He further testified as follows: "I knew at the time my title to the property was not consummated, and my impressions were if he got judgment, I think I told him that if he would go to work and get judgment against Chapin, Hurlburt, and Campbell, if he could not collect, if I could not show him some property to collect his rent, he might go on and attach the machinery, and I would bid it off at the amount of the debt, which would give me more title in the machinery. I think that
96 was the object in both working at it at the same time. He agreed to get judgment against them, to proceed, and I was to render any assistance. He rather wanted me to help him through with the matter. He was to proceed right off at once and get judgment as soon as he could, for I didn't know but what some other claim would come up and get ahead, or but what Campbell and Hurlburt would procure it and get it out of my hands; they had a right of redemption any way, and he understood that as well as I did. We agreed that if they did redeem it, the judgment would hold good any way, and it was better for him to get his judgment immediately." Witness further testified, that he and plaintiff afterwards met at Gondy's office in Chicago; that at this interview, the question came up whether witness was liable for rent prior to going into possession; he claimed that he was not liable for rent, that he had no lease of assignment of a lease. That about the same was said about getting judgment and bidding off property in Gondy's office as at Liverpool; that nothing was said about bidding off
97 or sale of any other interest than the machinery; that the lots were not mentioned to his knowledge.

When Gondy notified him to attend sale and bid, thinks he said, "Go ahead and sell. I don't care anything about it. I have nothing to do with it, for the machinery was here in Chicago, and he had nothing to do with the Liverpool lots;" that Gondy at that time did not call his attention to what occurred in his office when Hoppock and he were present, and Gondy did not claim that there was any understanding or agreement that Hoppock should levy on the lots

and Wicker should bid them off; that no such thing was mentioned, and never had any agreement with Hoppock to bid off lots.

Witness further testified: "In my agreement with Hoppock, I told him I would help him all I could in collecting that debt of Chapin. In 1861, I think in May or June, John McWilliams was buying goods of us. He came into the store, and, in conversation with us, said he had a considerable amount of money to pay Chapin. I asked
98 him if he would wait until I could get a man to garnishee; to accommodate me, he said he would; that he would wait any length of time. I went up to Gondy's office, and told Gondy that he could get the money, and I think his answer was, he would not meddle with it, or something of that kind. I think this was in May, 1861."

Witness further testified that when he removed the distillery fixtures and machinery to Chicago it was in bad condition and nearly ruined, and worth about $4,000.

On cross-examination witness testified in relation to the meeting at Gondy's office, as follows:

The agreement was to meet and get Gondy's opinion; that is all we met for. I think one opinion was in regard to whether I was liable prior to occupying the premises, and whether Hoppock could lease or arrange any way so he could fix up the concern there so as to be tenantable, and go along with it. He said he wanted to get along with me, and he wanted to help me and I must help him.

As to what was said at Gondy's office about agreement to bid
99 off property, witness *witness* further testified as follows:

Perhaps I can't tell all that was said, because a man can't remember. I don't believe any man could remember what was said from that time to this. I know the purport of it was that he was to sue and get judgment as quick as he could, and that if I could not show him some property—if none could be found—so that he could collect the debt against Chapin, he might put up the machinery and sell it, and I would *and I would* bid it off.

On re-direct examination witness further testified that he went into possession and commenced operating the distillery under the agreement or lease between himself and John P. Chapin & Co., first before introduced in evidence by defendant, bearing date December 6th, 1858, and held under that agreement; that he had no assignment of the lease by Cadwell & Boynton to Chapin & Co., in evidence, and did not at the time know of its existence. He further testified that his impression was that he claimed that he was not liable at all
100 to Hoppock for any part of the rent.

The counsel for said defendant here introduced and read in evidence a transcript of the record of the suit to foreclose the mortgage given by Cadwell to Hoppock, before alluded to, by which it appeared that said mortgage was given to secure the payment of $8,000, and interest thereon at the rate of seven per cent. per annum, on or before the 1st day of May, 1855, the mortgage bearing date

the 27th day of December, 1854, and covered the undivided half of the lots described in the lease of Cadwell & Boynton to Chapin & Co., in evidence in this cause, together with other real estate. The bill to foreclose the mortgage was filed December 9th, 1859. This bill was also for the foreclosure of another mortgage, bearing date January 24th, 1853, executed by said Boynton to said Cadwell upon the undivided half of said lots described in said lease to Chapin & Co., to secure a promissory note of same date by said Boynton to said Cadwell for $3,300, payable in three years from its date, with interest, which note and mortgage were duly assigned by Cadwell
101 to Hoppock; a final decree was rendered finding amount due on both mortgages to be $17,321 33. This decree was rendered Sept. 27th, 1862, and directs sale of mortgaged premises to pay amount due, &c. The premises mortgaged were sold to Hoppock by master in chancery on the 1st day of August, 1863, for $5,000. The master's report of sale was confirmed the 13th day of November, 1865.

The said defendant thereupon rested his case. It appeared that defendant Wicker was made a party to these proceedings.

And the said counsel for said plaintiff thereupon recalled William C. Gondy, who testified that no such condition to the agreement was mentioned in his office as that Hoppock was to levy on Chapin's interest in the distillery property, and Wicker was to bid it off, if the amount of his judgment could not be collected out of other property, or in any other way, of Chapin & Co; of this he was positive; never heard of any such condition or claim until some time in the year 1862.

The said plaintiff thereupon again rested his case.

102 The foregoing is all the testimony material to *to* the issues or questions arising in this cause which was given on said trial.

And, after argument by the respective counsel, the court instructed the jury as follows:

Gentlemen of the jury:

It is necessary that we should understand the position of the parties with reference to the property at the time that the transaction took place between them which has given rise to this suit. The plaintiff had a mortgage on some property in Fulton county. That property, or a part of it, had been leased by Cadwell and Boynton on the first day of July, 1857, to John P. Chapin & Co., of this city. On the property was a distillery and machinery, and everything connected with such manufactory. By the terms of this lease, which has been referred to, a rent of four hundred and fifty-five ($455) dollars per year was to be paid to the plaintiff, and the lease, I think, was to run for three years. It seems that the defendant had a claim of some sort against John P. Chapin & Co., and that by an
103 arrangement between John P. Chapin & Co. and himself he had gone into the possession of the property. It is said that he had made considerable advances, or that John P. Chapin & Co.

were indebted to him in a considerable amount. That he had taken possession of the property with the assent of J. P. Chapin & Co., is not disputed, and it was for the purpose of promoting his own interest absolutely independent of the claim, for the purpose of securing the whole or a part of the claim.

Now this was the position, substantially and briefly, of these two parties with reference to this property: The plaintiff had a mortgage upon the property; he was the payer of the rents under this lease; the defendant was in possession of the property for the purpose of promoting his own interest or securing this claim against John P. Chapin & Co.; the plaintiff was a resident of the city of New York the defendant of this city.

In the fall of 1859 the plaintiff came to this city and proceeded to Liverpool, where the property was situated, for the purpose of making some arrangement in relation to his claim. An interview took
104 place between the parties at Liverpool; what was stated there as between them we know by the testimony of the parties themselves, and that of the two witnesses who were present at the interview. Whether or not there was an agreement between the parties actually completed at Liverpool, of course is a question of fact for the jury. There was a subsequent meeting between the parties in Chicago. Both at Liverpool and in Chicago, as I understand, the plaintiff claimed that the defendant, in the position in which he was, should pay to him what was due for the use and occupation of the premises. The defendant denied that he was liable to pay for anything more than for the time that he himself had occupied the premises. It would seem as though the plaintiff insisted that under the circumstances he should pay for the indebtedness of J. P. Chapin & Co., and that the defendant claimed he only should pay for the time he himself had occupied; whether or not that was understood or agreed is of course a question of fact for the jury, to wit: whether he agreed and was willing that he would pay for the time he
105 had occupied or not.

The theory of the plaintiff is this: that having this claim against the property and insisting the defendant should pay it, they met together in Chicago, submitted the question of legal liability to Mr. Gondy, a member of the bar, and that it was arranged and agreed between them that whether there was a good and valid claim in law by the plaintiff against the defendant or not, for the whole amount of the indebtedness, that if the plaintiff would proceed against J. P. Chapin & Co., in a legal manner and recover judgment against them for the amount of the indebtedness which by a court of law should be adjudged to be due, that then the defendant, upon the sale which might be made on execution upon those judgments, would bid the amount of the indebtedness.

The theory of the defendant is, that the defendant was willing to do this provided the plaintiff could not realize the amount of his indebtedness in any other way, and it is said this was the arrangement and understanding at Liverpool; and it is also claimed by the defendant that was the understanding and arrangement here,

and that was the condition upon which alone he agreed to bid
106 the amount of the judgments. It should also be remarked that in addition to bidding the amount of the judgment, as claimed by the plaintiff, he agreed to pay certain insurance money and taxes. Now this is position of the parties with reference to the property, and it is in these two aspects that the case is to be regarded by the jury.

The legal questions involved in this state of facts are not free from difficulty. Still as I have an opinion in relation to the legal questions, I will now proceed to state what that opinion is, and the jury are to form their conclusions on the facts, assuming that to be the law of the case.

At the time that this arrangement was said to be made between the parties the defendant was confessedly in possession of and had an interest in the property; and if the theory of the plaintiff is true, he supposed that J. P. Chapin & Co. also had an interest in the property, because we have to assume that men do not agree to do such things except upon certain motives, and of course it is entirely inconsistent with the agreement which the plaintiff claims that
107 he made, if he supposed, in point of fact, that J. P. Chapin & Co. had no interest whatever in the property. I assume, therefore, that he supposed at that time that they had an interest in the property as well as himself. Now, this being so, the question arises whether this promise, if he made it, is within the statute of frauds—in other words, whether it was binding upon him, not being in writing, and I am of opinion that it is not; and for this, among other reasons: I think his main motive for making this promise was to promote what he considered to be his own interests, to do a benefit to himself, and not simply to do a benefit to J. P. Chapin & Co., or to pay the debt of John P. Chapin & Co.; that his object was to free himself from difficulties, which, otherwise, he thought threatened him in relation to this property. I think this was the main object in making the promise, if he did make it, and not simply to answer for the debt or default of another. Therefore, I think it was not a promise within the statute of frauds, and that it may be good, although
108 it was not in writing. The principal question in connection with this part of the case is, was this promise actually made, under the circumstances as contended for by the plaintiff, or was it a conditional promise as contended for by the defendant? You must be satisfied from this evidence that it was an absolute promise, else the plaintiff cannot recover—that is to say, an absolute promise that the defendant would bid the amount, provided the plaintiff brought suit and recovered judgment and offered the property for sale. If it were a conditional promise, namely, that if he could not recover the amount from J. P. Chapin & Co., in some other way, as by the levy and sale of some other property, then the plaintiff cannot recover, because the action does not proceed upon that basis. Now if you should believe that the theory of the plaintiff is true, then it is necessary to proceed a step further; the first question relates to the nature and character of the property which was the subject matter of.

this compromise. The declaration, I believe, sets it out in a double aspect; in the first place as connected with the real estate and the
109 improvements upon it. In the next place, as comprehending simply the machinery and distillery upon the property. Now, it may be proper for you to consider what is the fact in relation to this. Of course, if either is true, then it would be within the terms of the declaration—it being set forth in the alternative. But, as I understand the evidence of Mr. Gondy, where the plaintiff and defendant met at his office, the defendant had this lease which I now hold in my hand. He says that the conversation which took place there was in relation to the property described in this lease, and, as he understood, everything said referred to the property mentioned in the lease. If this is so, then we have to refer to the lease in order to understand what the parties meant in conversing with each other when the proposition was made on one side and accepted by the other. And if this is true, all you would have to do would be simply to refer to the property as described in the lease. I think that it is not claimed on the part of the defendant that any particular time for the recovery of judgment was mentioned. That
110 being so, the suit should be commenced within a reasonable time after the arrangement was made.

The first suit, in point of fact, was commenced on the 13th of December, 1859. The arrangement took place, if at all, the latter part of November, and there is no pretence but that suit was commenced within a reasonable time. It was prosecuted to judgment, which was obtained on the 13th of December, 1860, against John P. Chapin & Co., for nine hundred and ten dollars ($910) and costs. This was prosecuted in the circuit court of Cook county, where the defendants resided. Now it is for you to say, under the testimony, whether you believe it was prosecuted with reasonable diligence, because I apprehend that it should appear. You have heard the testimony upon that point, and you can say whether, as matter of fact, it was properly and diligently prosecuted. There seems to have been, from time to time, questions of law raised in relation to various matters, which, of course, you understand, would take more or less time to determine.

There has been nothing introduced in opposition to the state-
111 ment of Mr. Gondy upon the subject.

There was another suit commenced on the 11th December, 1860, in the superior court.

By Mr Fuller. If the court please, and will pardon me, I find that I made a mistake in that; it was the 23d November, 1860.

By Mr. Smith. That is the fact.

By the court. The next suit was commenced in the superior court on the 23d November, 1860. The first suit was defended, as it is said, with considerable pertinacity. The second suit was not defended at all, and a judgment was obtained by default, as I understand, on the 7th February, 1861, for seven hundred and six dollars and four cents ($706 04-100.) Upon these two judgments executions were issued, on the first, on the 16th January, 1861, on the second, on the 11th February, 1861, and sent to Fulton county. The

112 levy was made on the 8th March, 1861, on the property. We have the executions and the levies before us, and the levies seem to be upon the lots and upon the machinery, fixtures, engine, boiler, tubs, and other appurtenances belonging to the distillery.

This second suit was brought because the whole claim was not due at the time the first suit was brought—that is, the whole rent was not due. Now there was some delay which occurred after the levy; that was in consequence, as is alleged, of a bill in chancery having been filed by Price against Chapin & Co., on the 25th February, 1861, to which, afterwards, Hoppock, the plaintiff, became a party, and also, I believe, the defendant Wicker.

In consequence of this bill being pending the plaintiff could not proceed upon these levies, and they remained until some time in August, I think, following, when the plaintiff's attorney or counsel in that bill notified Mr. Gondy, the counsel who brought these suits in the circuit and superior courts against J. P. Chapin & Co., that he might proceed with his levies, and thereupon he notified Wicker of the fact and required him to be present and bid the amount,
113 according to his agreement, as was claimed. You recollect the testimony, as to the notice that was served upon Wicker, and the interviews which took place between Mr. Wicker and Mr. Gondy. Between the date of the levy and the time that these interviews took place, and this notice was given, the machinery and fixtures had been removed from the property and had been brought to Chicago by Wicker, and Wicker claimed that he had no further interest in it. According to the view which he took of it, the only thing he was interested in and in relation to which his promise was given, was the machinery and fixtures; and they having been removed, he claimed that his promise had become inoperative and had nothing to act upon, and he was relieved. Mr. Gondy, however, insisted that the plaintiff had, in all respects, complied with his portion of the contract, and that the contract on the part of the defendant was an absolute contract to make the bid after the suits were instituted and judgment obtained, and therefore called upon the defendant to respond. He not having done so, the property was advertised and sold, and, under the instructions of Mr. Gondy,
114 was purchased for a nominal sum in the name of Hoppock, the plaintiff.

The insurance, amounting to one hundred twenty dollars, ($120,) was subsequently paid by Mr. Gondy for the plaintiff, and there were some taxes that were due, the amount of which has been stated. Now it is for the jury to say whether they think, under the testimony, the plaintiff has proved the allegations contained in the declaration. If so, then under the view which the court takes of the law, the plaintiff can recover against the defendant. If he has not, the plaintiff cannot recover. It is for you to say what the fact may be. If you shall believe that the plaintiff can recover under the facts and under the instruction of the court, then I think the measure of damages would be the amount of the judgments and costs, which the defendant agreed to pay, and interest from the time that this bid should

have been made, which, I believe, was on the 9th of September, 1861.

The defendant did not attend at the sale, and did not make any bid; and, of course, in that respect, the plaintiff has proved
115 the allegation contained in the declaration. You will see from the view that the court has taken of the matter, that it depends altogether upon how you may regard the evidence concerning the agreement which is alleged and stated in the declaration. As to that you have the testimony of the parties as to what took place in Liverpool, and of the two witnesses, Snyder and Miller. As to what took place in Chicago we have the testimony of the parties and of Mr. Gondy. Now it is for you to say where the truth may be in relation to the facts, and to determine accordingly.

To the giving of so much of the said instructions of said court to said jury as assumes and decides that the agreement in controversy, so far as it relates to the obligation of said defendant to bid off at the judicial sale the property levied upon and exposed for sale on the 9th of September, A. D. 1861, was valid, and especially to the giving of the following part of such instructions, to wit: "Now it is for the jury to say whether they think, under the testimony, the plaintiff has proved the allegations contained in the declaration. If so,
116 then, under the view which the court takes of the law, the plaintiff can recover against the defendant," the said counsel for the said defendant then and there duly excepted. And to the giving of so much of said instructions as relates to the rule or measure of damages, and especially to the giving of the following instructions to said jury, to wit: "If you shall believe that the plaintiff can recover under the facts and under the instructions of the court, then I think the measure of damages should be the amount of the judgments and costs which the defendant, it is alleged, agreed to pay." And especially to the giving of so much of said instructions as directs the jury that in case of recovery the measure of damages, so far as the judgments against Chapin & Co. are concerned, should be the full amount of such judgments and interest from the time such bid should have been made, the counsel for said defendant then and there duly excepted.

And the said counsel for said defendant thereupon then and there requested the said court to instruct the said jury that the said agreement in controversy was and is within the statute of the State
117 of Illinois to prevent frauds and perjuries, and therefore invalid; but the said court then and there refused so to instruct said jury, to which refusal of said court so to instruct said jury the said counsel for said defendant then and there duly excepted.

And the said counsel for said defendant thereupon then and there requested the said court to instruct the said jury that the agreement in controversy between said plaintiff and said defendant that the plaintiff should levy on and expose for sale, upon the executions against Chapin & Co., the distillery property at Liverpool, and that the defendant should bid off the same for the amount of the judgment, was invalid, because calculated to interfere with and prevent

the fairness and freedom of a judicial sale, and to prevent competition among bidders at such sale, and therefore against public policy; but the said court then and there refused so to instruct said jury, to which refusal of said court so to instruct said jury the said counsel for said defendant then and there duly excepted.

118 And the said counsel for said defendant thereupon then and there requested the said court to instruct the said jury that if they believed, from the testimony, that the agreement between the said plaintiff and defendant was that the plaintiff was to levy only upon the machinery and fixtures of said distillery and not upon the lots or real estate upon which said distillery was situate, and expose the same for sale, and that the said defendant only agreed to bid off such machinery and fixtures, and did not agree to bid upon said lots, then, for this reason, the plaintiff could not recover damages for the neglect or refusal of defendant to attend said sale and bid thereat, for the reason that the said plaintiff levied upon and called on defendant to bid off a property and interest greater than and different from the property and interest which he agreed to bid off; but the said court there and then refused so to instruct said jury, to which refusal so to instruct said jury the said counsel for said defendant then and there duly excepted.

119 And the said counsel for said defendant thereupon then and there requested the said court to instruct the said jury that in any view the measure of damages for neglect or refusal of defendant to attend the judicial sale and bid off the property on the 9th day of September, 1861, would be only the injury actually sustained by said plaintiff in consequence of such neglect or refusal, and that in the absence of averment in the declaration of the insolvency of Chapin & Co., or other facts showing that said plaintiff thereby lost his debt or claim against Chapin & Co., and in the absence of proof to sustain such averment, the plaintiff would not be entitled to recover as damages the full amount of such judgments; but the said court then and there refused so to instruct said jury, to which refusal of said court so to instruct said jury said counsel for said defendant then and there duly excepted.

And the said jury thereupon retired in charge of an officer, and after consultation returned into court and rendered a verdict for said plaintiff, and assessed his damages at the sum of $2,763 08.

120 And because none of the aforesaid exceptions appear of record the said circuit judge has allowed, signed, and sealed this bill of exceptions this 26th day of May, A. D. 1866.

[SEAL.] THOMAS DRUMMOND.

Indorsed: Filed May 26th, 1866.

WM. H. BRADLEY, *Clk.*

121 And afterwards to wit, on the second day of June, A. D. 1866, the said defendant, Joel H. Wicker, filed in said court, in said entitled cause, his bond in error, with a power of attorney thereto annexed, which said power of attorney and bond, together with the approval of the same, by the court, are in the words and figures following, to wit:

Circuit court of the United States, nor. dist. of Ills.

ELY HOPPOCK
vs.
JOEL H. WICKER.

I hereby appoint C. G. Wicker, by attorney, with authority
122 to execute for me and in my name any necessary bond or other instrument for the prosecution or perfection of an appeal or writ of error to the Supreme Court of the United States in this cause.

Witness my hand and seal this 16th day of June, A. D. 1866.

[SEAL.] J. H. WICKER.

Know all men by these presents, that we, Joel H. Wicker, of Chicago, Illinois, as principal, and Charles G. Wicker, of the same place, as surety, are held and firmly bound unto Ely Hoppock, of the State of New York, in the penal sum of five thousand dollars, to be paid to the said Ely Hoppock, his certain attorneys, executors, administrators, and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 29th day of June, in the year of our Lord one thousand eight hundred and sixty-six.

Whereas lately, to wit, on the 23d day of June, A. D. 1866,
123 at a circuit court of the United States for the northern district of Illinois, in a suit pending in said court between the said Ely Hoppock, as plaintiff, and the said Joel H. Wicker, as defendant, in assumpsit, judgment was rendered against the said Joel H. Wieker, for two thousand two hundred and six dollars and forty-one cents damages, and fifty dollars and thirty-five cents costs; and the said Joel H. Wicker, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ely Hoppock, plaintiff, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now the condition of the above obligation is such, that if the said Joel H. Wicker shall prosecute his writ of error to effect, and shall answer all damages and costs if he shall fail to make good his plea, then the above obligation to be void, else to remain in full force and effect.

[SEAL.] J. H. WICKER.
By C. G. WICKER,
His Att'y in fact.

[SEAL.] CHAS. G. WICKER.

Indorsed: Filed July 2d, 1866.

WM. H. BRADLEY, *Cl'k.*

124 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the said northern district of Illinois, do hereby certify the foregoing transcript, from pages one to one hundred and twenty-three, inclusive, to be a true and correct copy from the record of all the proceedings which have been had in said court in said entitled cause of Eli Hoppock against Joel H. Wicker, as the original of the same now remain of record in my custody.

In testimony whereof I have hereunto set my hand affixed the seal of the said court, at my office in Chicago, in said northern district, this twenty-fourth day of November, A. D. 1866.

[L. S.] WM. H. BRADLEY, *Clerk.*

Original writ of error and citation hereto attached.

WM. H. BRADLEY, *Cl'k.*

[5-cent stamp, cancelled.]

125 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Ely Hoppock, plaintiff, and Joel H. Wicker, defendant, a manifest error hath happened to the great damage of the said Joel H. Wicker, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at

126 Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirtieth day of June, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninetieth.

[L. S.] WM. H. BRADLEY, *Clerk.*

127 The United States of America to Ely Hoppock, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error

filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Joel H. Wicker is plaintiff in error, who is a citizen of the State of Illinois, and you, Ely Hoppock, a citizen of the State of New York, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, of the circuit court of the United States for the northern district of Illinois, this 2d day of July, A. D. 1866.

THOMAS DRUMMOND.

128 We acknowledge service of a copy of the within citation upon us this 2d day of July, A. D. 1866.

SCAMMON, McCAGG & FULLER,
Att'ys for Ely Hoppock, Def't in Error.

IN THE

Supreme Court of the United States.

JOEL H. WICKER, *Plaintiff in Error*,

v.

ELY HOPPOCK, *Defendant in Error.*

No. 350.

ARGUMENT FOR DEFENDANT IN ERROR,

By SAM. W. FULLER.

Beach & Barnard, Steam Printers, Nos. 122 & 124 So. Clark St.

IN THE

SUPREME COURT OF THE UNITED STATES,

December Term, A. D. 1866.

JOEL H. WICKER, *Plaintiff in Error*,

v.

ELY HOPPOCK, *Defendant in Error.*

No. 350.

ARGUMENT FOR DEFENDANT IN ERROR.

THIS was an action of assumpsit brought by the defendant in error, who is a citizen of the State of New York, against the plaintiff in error, in the Circuit Court of the United States for the Northern District of Illinois.

It appears by the evidence, that the defendant in error was, on and before the first day of July, 1857, the holder of a mortgage on a certain distillery, and the lots upon which it stood, situated in Liverpool, Fulton county, Illinois. This distillery property was, on the first day of July, 1857, leased by the owners thereof to John P. Chapin & Co., for a term of three years, at an annual rent of $455; and it was agreed in the lease that the lessees should pay their rent to the defendant in error as interest upon

the mortgage which he held, and that they should also pay the insurance and all taxes upon the property. (See record, pages 22 and 23.)

In April, 1859, the plaintiff in error took possession of the premises under an agreement with Chapin, Hurlburt & Co., which is set out on page 28 of the record, and also under a mechanics' lien decree, and was using the same as a distillery, when, on the 24th day of November, 1859, the defendant in error came to Liverpool to try to get the rent due him under the lease of July 1st, 1857, none of which had then been paid. He wished the plaintiff in error to pay him all that was due from the date of the lease, which he was unwilling to do. They had several interviews on the subject at Liverpool, and one at the office of Mr. Goudy, in Chicago, on the 28th or 29th of November, 1859, and it was finally agreed between them that, if the defendant in error would obtain judgment against Chapin & Co., for the two years' rent already due, and for the third year's rent when it became due, and would have executions issued and levied upon the distillery property, the plaintiff in error would bid off the property at the whole amount due the defendant in error; and would also pay the taxes and insurance, according to the agreement in the lease to Chapin & Co. (See pages 21 and 22 of the record.)

It appears that, at the time of this agreement, John P. Chapin & Co. were largely indebted to the plaintiff in error (pages 30 and 31 of the record), and that he was trying to get a complete title to the distillery fixtures. (Pages 33 and 34 of the record.)

There is some discrepancy in the testimony of the defendant in error (page 22), the plaintiff in error (page 34), Mr. Goudy (page 24), Mr. Miller (page 32), and Mr. Sny-

der (page 33), as to whether it was agreed that the *real estate* was to be levied upon, but the declaration contains counts to cover either case.

It is shown by the testimony (page 32 of record), that, at the time of making this agreement, there was, in and about the distillery at Liverpool, belonging to Chapin & Co., four hundred and twenty hogs, fifty or sixty barrels of high-wines; and a canal boat worth $2,500, and a boat load of lumber at Pekin, 18 miles distant; and that all this property, except the lumber, was taken away during the winter and spring of 1860.

In pursuance of this agreement, a suit was commenced against Chapin & Co. on the 13th of December, 1859, for the two years' rent already due, and judgment was recovered therein on the 3rd of December, 1860, for $910 damages, and $29.35 costs, and execution was issued on the 16th of January, 1861. A suit for the third year's rent and other arrears, was commenced on the 23d of November, 1860, and judgment rendered therein on the 7th of February, 1861, for $706.04 damages, and $10.70 costs, and execution was issued February 11th, 1861. (See page 26 of record.)

These executions were levied upon the lots, machinery and fixtures appertaining to the distillery at Liverpool, on the 8th of March, 1861, and the day of sale was fixed, by agreement with the plaintiff in error (page 24 of record), to take place about the 20th of April, 1861; but the proceedings under the execution were stopped by an injunction obtained by a third party, which was, however, dissolved during the summer of 1861. (See pages 24 and 25 of record.) The sales were then fixed to take place on the 9th of September, but the plaintiff in error caused the machinery and fixtures of the distillery to be removed to Chicago, in August, 1861, by means of steamboats and

barges, which arrived at the landing for that purpose on a Saturday night, and left on the Monday morning following. (See page 33 of the record.)

Mr. Goudy, the attorney for the defendant in error, notified the plaintiff in error, personally, of the date fixed for the sale, some days before the 2nd of September, 1861, when the plaintiff in error at first said he would not bid off the property as he had no interest in it, since he had removed the machinery, but finally said he would do so. Mr. Goudy thereupon caused a written notice to be served on the plaintiff in error on the 3rd of September, 1861. (See pages 25, 26 and 27 of the record.)

The plaintiff in error was not present at the sales under the two executions, nor was any bid made in his name, but the property was sold under each levy to the defendant in error, for one dollar. (Pages 26 and 27 of the record.) The defendant in error thereupon brought this suit, to recover the damages he had sustained by the failure of the plaintiff in error to fulfil his agreement; and on the trial of the cause, the jury returned a verdict for the plaintiff below, for $2,763.08. Of this, the plaintiff below remitted $556.67, on account of insurance and taxes, and judgment was entered the 23d of June, 1866, for $2,206.41, which was the amount of the judgments against Chapin, with costs and interest to the date of the trial. (See pages 19 and 20 of the record.)

The questions in the case, arise upon the exceptions by the defendant below to the instructions given to the jury by the judge who tried the cause, and to his refusal to give the jury several instructions which were asked by the defendant, Wicker. (See pages 42 and 43 of the record.)

The verdict of the jury has determined that the parties made the contract set out in the declaration from page 3 to

13 of the record, and the questions raised by the plaintiff in error in his exceptions to the charge of the court (for we have not seen the argument for him in this court) may be stated as follows:

First. Was the agreement, between the parties, within the Illinois statute of frauds and perjuries, and therefore void because it was not in writing?

Second. Was the agreement void, as tending to interfere with the fairness and freedom of judicial sales?

Third. Did the court err in instructing the jury, that the measure of damages for breach of the alleged agreement, was the amount of the judgments and costs against Chapin & Co., with interest from the time the bid should have been made at the sheriff's sale?

Fourth. Did the court err in refusing to instruct the jury, that the levy by the plaintiff of the executions against Chapin & Co., upon the lots on which the distillery stood, as well as upon the distillery and fixtures, excused the defendant below from attending the sale and bidding off the machinery and fixtures, if it was the agreement that he should do so? (Page 43, folio 118.)

I.

The agreement was not within the statute af frauds, because Wicker did not agree to pay the debt of Chapin & Co., but to attend at a sheriff's sale of their interest in the property levied on, and bid the amount of the executions, if Hoppock would obtain judgments against them, for the amount of rent which Hoppock claimed he had a right to recover of either Wicker, as the occupant of the premises,

or of Chapin & Co., as the lessees. The relations of all the parties to the property, and to each other, are fully stated by Hoppock in his testimony, pages 21 to 23; by Goudy, on pages 23–4, and by Wicker, on pages 33 to 36, and all this was fairly stated to the jury in the charge of the court, pages 37–8, and the case must be governed by the rule laid down by this court, in the case of *Emerson* v. *Slater*, 22 Howard, 43.

"Whenever the main purpose and object of the promissor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. *Nelson* v. *Boynton*, 3 Met., 400; *Leonard* v. *Vredenburg*, 8 Johns. R., 39; *Farley* v. *Cleveland*, 4 Cow., 432; *Alger* v. *Scoville*, 1 Gray, 391; *Williams* v. *Leper*, 3 Bur., 1886; *Castling* v. *Aubert*, 2 East., 325; 2 Parsons on Con., 306. Nothing is better settled than the rule, that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise on behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff, to enable the latter to maintain an action upon the promise to recover compensation. 2 Addison on Contracts, 1002, and cases cited."

At the time the alleged promise was made, Wicker was in possession of the premises, and liable for the rent as occupant.

Taylor's Landlord and Tenant, 294 to 297—
Sections 448 to 450;
Quackenboss v. *Clark*, 12 Wendell, 555.

He went into possession under the agreement between himself and Chapin & Co., set out on pages 28 and 29, as he testified (see page 36, folio 100), and also under a mechanics' lien decree, as Hoppock stated (page 21, folio 57), and was a large creditor of Chapin & Co., as appears by the agreements between him and them, set out on pages 30, 31. On page 30 is a recital in one of those agreements, that Wicker had become, and was then, (August 12th, 1859), the owner, and in the possession, of the distillery property (fol. 82.). It appears from all these papers, that Wicker had taken and held possession of the premises, to secure his debts against Chapin & Co., and from the whole case it is apparent, that by buying the premises at an execution sale of Chapin & Co.'s interest in them, he would strengthen his security, and Wicker so testified (page 33, fol. 91–2–3, page 35, fol. 96).

It is therefore apparent, that Wicker entered into the agreement, not to pay Chapin & Co.'s debt, or to help them in any way, but for the purpose of thus acquiring their title to the distillery property as a further security for their indebtedness to him.

These considerations show that the case is within the rule established in *Emerson* v. *Slater*, 22 Howard 43, as to the statute of frauds, and in many other features, the cases are alike, but it is not necessary to notice them any further than to say, that there was an ample legal consideration for Wicker's promise to Hoppock, which was this: Suing Chapin & Co. at Wicker's request, and after a year's hard litigation, obtaining judgments against them for a debt, as well due from Wicker, as from them. Hoppock relied upon Wicker's promise, and performed his part of the agreement by obtaining the judgments and levying the executions, at the expense of counsel fees, costs of

court, &c. So that whether we look at the agreement as imposing cost and liability on Hoppock, or tending to the advantage of Wicker, we find ample consideration to support it, and see that it was an original, independent agreement between the parties, and not, in any way, collateral to the liability of Chapin & Co. When it is seen that Hoppock was claiming his rights to the rent of the premises, under the lease to Chapin & Co., and also as a mortgagee of the same premises, as against Wicker, who was in possession of them, under Chapin & Co., for his own benefit as their creditor, it becomes clear that the case falls within the rule stated by Parsons, in his work on Contracts, vol. 3, page 25, edition 1864, as follows:

"If a creditor has a lien on certain property of his "debtor to the amount of his debt, and a third person, "who also has an interest in the same property, promises "the creditor to pay the debt in consideration of the cred- "itor's relinquishing his lien, this promise is not within the "statute."

The contract was not for the sale of any interest in lands sold by Hoppock to Wicker, for no sale between them, or between either of them, and third persons, was intended by the agreement. The agreement did not concern lands at all, but only the distillery machinery. See Hoppock's testimony, fol. 58, and Wicker's, fol. 92 and 95.

We conclude, from the foregoing authorities and reasoning that the case is not within the statute of frauds.

II.

The agreement between the parties did not violate any rule of public policy relating to judicial sales, for no wrong was intended against anybody's rights; and none would have been done, had it been performed.

As to Hoppock, he would have received the amount of his judgments against Chapin & Co.

As to Chapin & Co., their property would have brought the amount of their indebtedness to Hoppock, as established by the judgments, by a sale of their interest in the distillery property, if they did not pay the judgments before sale, which was not only their right but their duty, and so save a sale of their property.

And as to Wicker, he would only have done what he agreed to do; and if he made a bad bargain by promising to pay more than Chapin & Co.'s interest was worth, that is no excuse for not keeping his promise. There was no agreement to prevent third persons from bidding, or to sacrifice the property of Chapin & Co. by any trick or deception at the sheriff's sale; nor was there any agreement not to bid against each other, or against others who might attend the sale.

Having obtained his judgments, and made the levies, the plaintiff had a right to expect that the defendant would bid the amount due, as he had agreed. The property was heavily encumbered, and Chapin & Co.'s interest might not be worth that sum; to secure himself against the loss of all or a part of his debt, the plaintiff agreed with Wicker, that the latter would bid the amount of the judgments, which could not possibly do any harm to Chapin & Co., for their debt to Hoppock would thus be paid; and if their property was at all likely to be sacrificed by such a sale, they had only to pay their debt, and save it.

There was no agreement that Hoppock, or any one else, should not bid at the sale, and thus prevent competition. Hoppock might have bid the full amount of his judgments, or any less amount had he seen fit to do so, rather than rely on Wicker's promise. Had he bid the full

amount, he would then have had no claim on Wicker, nor would he have had, if Chapin & Co. had paid the judgments; but he chose to rely on Wicker's agreement to bid the full amount due on the judgments, rather than bid off property which was heavily encumbered in his own and Wicker's favor.

This statement of the case, seems to us, to show that the agreement did not come within the rules which forbid secret bidding, or agreements not to bid at judicial sales.

Those rules only forbid agreements made with a fraudulent purpose, and agreements *not to bid* at such sales, as was clearly stated by the Supreme Court of Massachusetts in *Phippen* v. *Stickney*, 3 Metcalf, 384, and by that of New York in

Bame v. *Drew*, 4 Denio, 287;
The National Fire Insurance Company v. *Loomis et al*, 11 Paige, 431.

So in Illinois:

Garrett v. *Moss et al.*, 20 Illinois, 549;
Switzer et al. v. *Skiles et al.*, 3 Gilman, 529;
Pearsons v. *Lee*, 1 Scammon, 193;

In Pennsylvania:

Smull v. *Jones*, 1 Watts & Sergeant, 128;
Story on Sales, sec. 484.
Kent, 539, (side paging and notes, ed. of 1866.)

There was nothing in this agreement, that any one should not bid who wished to obtain the property; it was only by the plaintiff in error not fulfilling his part of the agreement that the competition was lessened.

We have not seen the brief which will be filed for the plaintiff in error, and so we cannot tell what cases will be

relied on, nor what argument made on this point; but we have examined all the cases within our reach, bearing on this subject, and do not find that any of them decide that such an agreement, as was made between Hoppock and Wicker, is void.

It was neither an agreement for secret bidding, nor to refrain from bidding, nor to sacrifice the property of Chapin & Co., at an under price, and should, therefore, be held valid upon the authorities we have cited above.

III.

The court below properly instructed the jury upon the question of damages.

The declaration states that the judgments against Chapin & Co., remain wholly unpaid, except for the sum of one dollar each; and there was no proof that anything more had ever been paid. Hoppock was entitled, under the agreement with Wicker, to receive the full amount of the judgments at the time of the sale. The contract furnished the rule of damages.

"The amount which would have been received if the "contract had been kept, is the measure of damages, if "the contract is broken."

Alder et al. v. *Keighley*, 15 Meeson & Welsby, 116;
Hill v. *Knapton*, 12 Meeson, and Welsby, 617;
Sedgwick on Damages, 203—4, Ed. 1852;
Thompson v. *Alger*, 12 Metcalf, 428;
Thomas v. *Dickinson*, 23 Barbour, 431.

IV.

The remaining question arises upon the request of the plaintiff in error, that the court should instruct the jury, that the plaintiff below could not recover damages for Wicker's failure to attend and bid at the sale, because Hoppock had levied his executions upon machinery and fixtures, and also, upon the lots on which the distillery stood.

The declaration stated the agreement as to the levy both ways, so as to cover the lots, and the machinery and fixtures.

As to the lots, see page 3, folio 9—page 5, folio 14.

As to both lots and fixtures, page 7, folio 19, and as to the fixtures and machinery, page 9, folio 25.

The levies were made on the lots, and also, on the machinery, fixtures, &c.—page 26, folios 72–3.

Wicker was notified of the sale, under the executions, of the "distillery property," and to attend and bid "according to his agreement"—page 27, folio 75.

Hoppock testified that he agreed to levy upon the machinery and fixtures—page 21, folio 58. Goudy testified that the agreement was "to levy upon the property at Liverpool—page 24, folio 65. Wicker testified that the levy was to be made on the machinery—page 34, folio 92, page 35, folio 96—"as that would give him more title to "the machinery."

It is therefore plain, that the evidence sustained the finding of the jury, and proved the agreement as laid in the declaration, and as Wicker was only notified to attend the sale and "bid off the property in accordance with his agreement with Hoppock," he had all the notice and opportunity to which he was entitled, to fulfil his agreement to at-

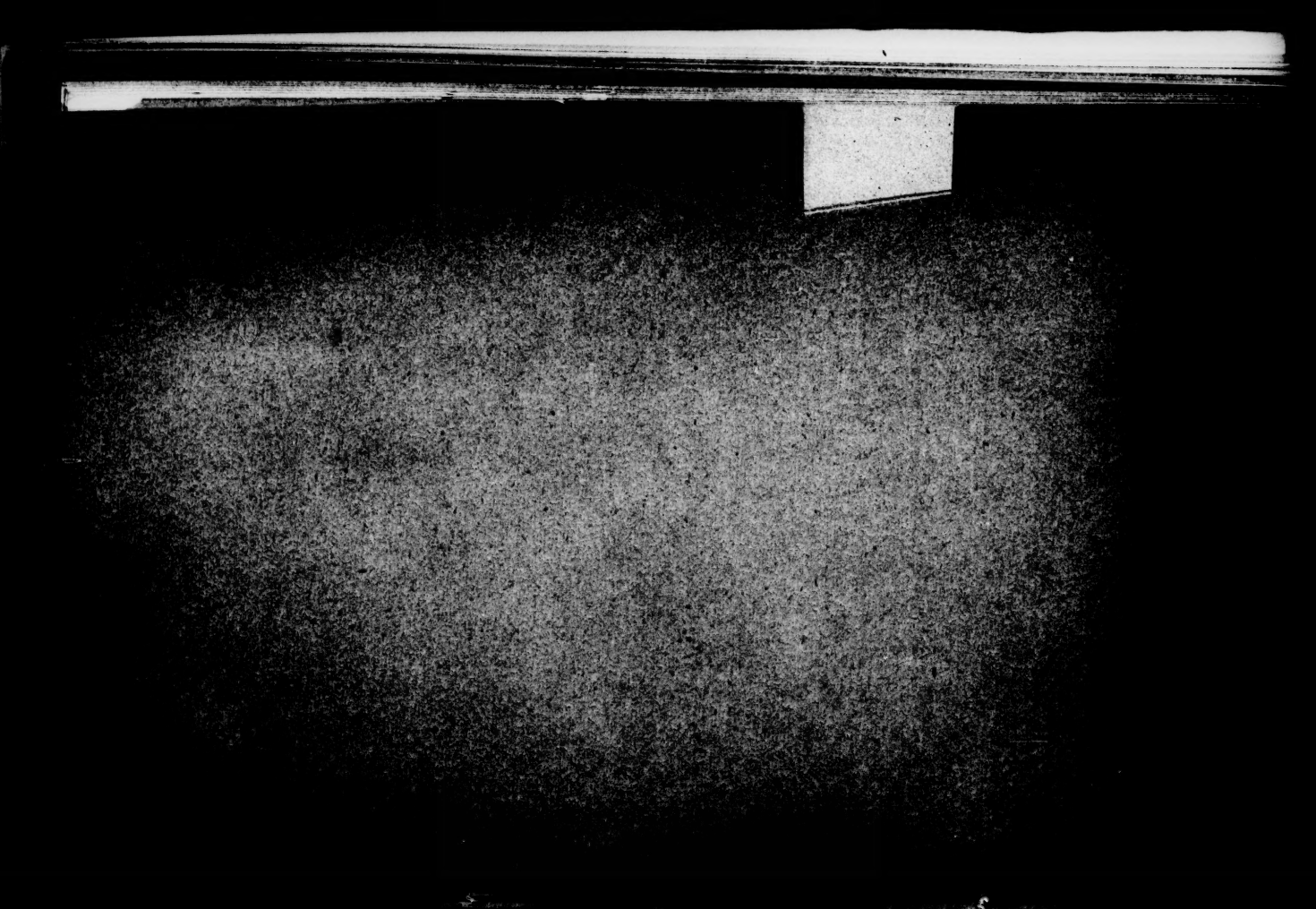
tend the sale, and bid off the machinery, etc., which were levied upon separately from the lots (pages 26–7).

The reason why he did not, appears on page 33, folio 89. After the executions were levied, and in the month of August, preceding the 9th of September, when the sale was to be made, Wicker removed the machinery and fixtures from Liverpool to Chicago, between Saturday night and Monday morning, and when Goudy notified him of the day of sale, he replied, that "he did not intend to bid "off the property. That he had no interest in it. It "would not do him any good. That the fixtures and "machinery had been removed from Liverpool to Chicago, "and he was using them, and therefore it would be no "benefit to him, and he would not do so" (page 25, folio 70).

This explains the whole matter. He preferred to run off the machinery, etc., after Hoppock had levied on it, and got ready to have him bid it off, to keeping his agreement, and paying Hoppock the amount of the judgments. This shows a wicked purpose on the part of Wicker, to evade his liability to Hoppock, under the agreement set out in the declaration, and we think that both "public policy," and "sound policy," and honesty, will be promoted by holding him to his engagements, and affirming the judgment of the Circuit Court.

SAMUEL W. FULLER,
for Defendant in Error.

CHICAGO, Jan. 16, 1867.



IN THE

SUPREME COURT OF THE UNITED STATES.

JOEL H. WICKER, *Plaintiff in Error*,

vs.

ELY HOPPOCK, *Defendant in Error.*

No. ——

ARGUMENT FOR PLAINTIFF IN ERROR.

This was an action of assumpsit, to recover damages for the breach of an alleged executory agreement to appear at a sheriff's sale, and bid off certain property levied upon by two executions, in favor of Hoppock and against John P. Chapin & Co., for the full amount of the judgments upon which such executions were issued.

Hoppock recovered against Wicker in the court below, (pages 53, 54 and 55 of record,) the sum of $2,206.41 damages, besides costs, and the case is now here upon writ of error prosecuted by Wicker.

I.

There was no valid agreement between Hoppock and Wicker. The property to be disposed of belonged to Chapin & Co., but was in possession of Wicker, who held it for advances; and it was redeemable by Chapin & Co. upon payment of the amount of advances. The agree-

ments showing this state of things, are to be found in the record, from page 75 to 87; and the testimony of Miller and Wicker, to be found at pages 88, 90, 91, 92, 95 and 96, shows the same. The property, consisting of machinery and fixtures for a distillery, was attached to real estate upon which Hoppock held a mortgage, and which had been leased to Chapin & Co., for a rental equal to the interest of Hoppock's mortgage,—the rent payable directly to Hoppock, to satisfy interest. The rent or interest being unpaid, Hoppock at first claimed that Wicker was liable to him for the whole amount. This Wicker denied, insisting that he could in no event be held but for a part. Hoppock, desiring to collect his interest, and Wicker desiring to acquire an indefeasible title to the property, by cutting off Chapin & Co.'s right of redemption through a judicial sale, and at the same time relieve himself from any supposed liability for any portion of the rent; it was agreed between them that Hoppock should proceed to judgment or judgments against Chapin & Co. for the rent, issue executions, levying upon the property in question, expose it to judicial sale, and Wicker should bid it off for the amount of the judgments.

This is the case, as presented by the uncontradicted testimony of Hoppock, (page 56 to 61 of record,) of Goudy, (page 63 to 71 of record,) and of Miller, Snyder and Wicker, (page 86 to 100 of record.) This agreement was invalid, because calculated to interfere with, and prevent the fairness and freedom of a judicial sale; to prevent competition at such sale, and therefore against public policy.

In *Thompson* v. *Davis*, (13 Johnson N. Y. Rep. 112,) two executions were issued against the property of Doughty; one upon a judgment in favor of the plaintiff, and the other upon a judgment in favor of the defendant, though

in the name of the Bank of Columbia. The plaintiff's was the senior execution. Both were levied upon the real and personal property of Doughty. Before the sale, it was agreed between the plaintiff and defendant, upon what the court held to be a sufficient consideration, that the plaintiff should bid off the personal property of Doughty, for the amount of his execution, and that the defendant should bid off the real estate, for the amount of his execution, which was accordingly done. But the court held the agreement void, as tending to prevent freedom, fairness and competition at judicial sales, for the reason that the plaintiff in each writ was a competent bidder upon both executions, and therefore any agreement tending to prevent or trammel such bidding, was void, because tending to sacrifice the property of the defendant in the writs, and therefore against public policy. To the same effect is the case of *Jones* v. *Caswell*, (3 Johns. Cases, 29,) commented upon and approved by SPENCER, Chief Justice, in delivering the opinion in *Thompson* v. *Davis*. The same principle is affirmed in *Meach* v. *Bennett*, (Hill & Denio's Rep. 191.)

Brisbane v. *Adams*, 3 Comstock's Rep. 129.
Slingluff v. *Eckel*, 24 Penn. State Rep. 472.

The law guards all judicial sales with jealous care, and any outside agreement or understanding, that any one person competent to bid will abstain from bidding, will not be enforced, no matter how pure the motive or meritorious the consideration moving to such agreement; and it matters not even if the defendant in the writ assents to such agreement, for his creditors, as well as himself, have a right to say that nothing shall be done tending to sacrifice his property. Such is the law, as affirmed by the cases above cited. So in this case, carrying out the agreement, Hoppock could not bid at the sale. The agreement, there-

fore, should not be enforced. It is no answer to say that Hoppock was not bound to bid, and might not have done so in the absence of any agreement. It is sufficient to say, he was at liberty to bid. He was a competent bidder. [See *Thompson* v. *Davis*, above cited, at page 115.]

It may be urged that this agreement did not involve an understanding that Hoppock should not bid against Wicker at the sale; but it can bear no such construction. The very language of the witnesses forbid this. Mr. Goudy, Hoppock's witness, and his attorney who transacted the business for him, says, that Wicker proposed that if Hoppock would proceed to judgment and execution, he (Wicker) "would *bid off* the property for whatever the judgment "and costs might be." That "the conversation resulted "in Hoppock *assenting to the proposition.*" (See pages 65 and 66 of record.) He also testified, that afterward he talked with Wicker, and Wicker said he would *do* nothing about it. That he (Goudy) then stated to Wicker what he understood the agreement to be. That he had agreed to *bid off this property*, whenever Hoppock obtained judgment and levied upon the property, *for the amount of the judgment.* "That Wicker sat and thought a minute, and "then said, 'very well, go on and give your notice, and "*I will bid them off.*'" (Pages 68 and 69 of record.) In consequence of Wicker's reluctance, Goudy served him with a written notice of time and place of sale, in which he says: "I send you this notification, that you may *bid off* "*the property, in accordance with your agreement with* "*Hoppock, for the debt, interest and costs.*"

The same language is to be found in the testimony of the witnesses Miller and Snyder, (pages 87–89 of record,) and Wicker testified that he agreed to *bid off* the property, which would give him "*more title to the machinery.*"

(Pages 92, 95 and 96 of record.) This was the object to be accomplished, says Wicker, and there is nothing contradictory in the record. It was not only the understanding, but the express agreement, that Wicker was to *bid off* this property at the amount of the judgments. And how could he bid off the property, unless it should be struck off to him by the sheriff? and how could the sheriff strike it off to him, if, having bid the required sum, Hoppock should bid against him, and thus become the highest bidder? Had Hoppock bid against Wicker, and thus deprived him of this property, to which he desired to obtain a more perfect title, he would have as clearly violated this agreement as did Wicker, by failing to appear and bid the amount of the judgments. Again, unless this be the true construction of this agreement, then it must fail for want of mutuality; for unless Hoppock was bound to permit Wicker to bid off and take the property at the amount of the judgments, how can it be maintained that Wicker was bound to make the bid?

This point, that the agreement was invalid, was distinctly made in the court below, and an exception saved by bill of exceptions. (See pages 115, 116 and 117 of record.)

It is submitted, therefore, that for this error in the court below, the judgment should be reversed.

II.

But, conceding the validity of the agreement, the court below erred as to the measure of damages. Upon this question the court instructed the jury as follows:

"If you shall believe that the plaintiff can recover un-
"der the facts and under the instruction of the court,
"then I think the measure of damages would be the

" amount of the judgments and costs which the defendant " agreed to pay, and interest from the time such bid should " have been made." To the giving of which defendant below duly excepted. (Pages 114, 116 of Record.)

The counsel for said defendant also " requested the said " court to instruct the said jury, that, in any view, the measure of damages for neglect or refusal of defendant to " attend the judicial sale, and bid off the property, on the " ninth day of September, 1861, would be only the injury " actually sustained by said plaintiff, in consequence of " such neglect or refusal, and that in the absence of averment in the declaration of the insolvency of Chapin & " Co., or other facts showing that said plaintiff thereby " lost his debt or claim against Chapin & Co., and in the " absence of proof to sustain such averment, the plaintiff " would not be entitled to recover as damages the full " amount of such judgments." The court refused so to instruct, and defendant excepted. (See page 119 of Record.)

The jury thereupon found a verdict for full amount of judgments and interest, upon which a judgment was rendered. It is true, as recited in the foregoing, that there is no averment in the declaration of the insolvency of Chapin & Co., or that Hoppock lost his claim against them, or any part of it, in consequence of Wicker's failure to appear and bid at the sale, nor was any proof to this effect offered by Hoppock.

Wicker failing to appear and bid, Hoppock himself bid off the property levied on for the nominal sum of two dollars (pp. 72, 73 of Record), so that Hoppock now holds the judgments against Chapin & Co., in full force, except the two dollars bid by himself; also a judgment against Wick-

er, for the full amount of such judgments, and the property sold to him at the sheriff's sale, all of which he would seem to have the right to hold on to and enforce, unless this judgment against Wicker be reversed; for Wicker does not stand in the relation of surety for Chapin & Co., nor is he in any position to be subrogated to the judgments against them, on paying the judgment against himself, upon any known principle of law or equity. A most singular result, indeed! but such as might be expected as the fruits of the erroneous rule of damages, adopted by the court below. It arose out of a departure by the court from that salutary and elementary principle, that in all actions upon contract, "the damages are *strictly limited* to "the *direct pecuniary loss* resulting from a breach of the "agreement in question."

Sedwick on Damages, 204.

If Chapin & Co. were solvent (and they are presumed to be, see *Walrod* v. *Ball*, 9 Barb., N. Y. Reps., 271), then the direct pscuniary loss sustained by Hoppock by the failure of Wicker to bid, was but nominal, as his judgments would be worth par, and they could be worth no more had Wicker fulfilled his agreement. If they were good for a portion, then Hoppock's direct pecuniary loss was only equal to the balance. Whatever the property was worth that Hoppock bid off at the sheriff's sale, should also be deducted from his direct pecuniary loss, for had Wicker bid it off, Hoppock certainly could not. Yet without any reference to these questions, the court below instructed the jury peremptorily to find as damages the full amount of the judgments and interest.

As to adjudged cases, it is difficult to find one like this in which the question of damages has been considered, for it is difficult to find an instance in which an agreement

like this has been sustained by a court of justice. Perhaps the nearest analogies are to be found in cases against sheriffs or upon sheriff's bonds, for damages in consequence of neglect to levy upon property in satisfaction of the judgment.

The obligation of the sheriff to levy, is as sacred and as binding as the agreement of Wicker in this case could possibly be. The result of a compliance with such obligations, is precisely the same in both cases, namely, the satisfaction of the judgment and the ultimate receipt of full payment thereof by the plaintiff in the writ. The consequences of a failure to comply with the obligations, are also precisely the same in both instances. The judgment is unsatisfied, but still remains in full force as a security for whatever it is worth. The rule of damages established in the one case, should, therefore, serve as a guide in the other.

In *Hodson* v. *Wilkins*, 7 Greenleaf's Reps., 113, which was an action on the case against a sheriff for not arresting the defendant on a *ca. sa.*, it was held that the measure of damages was not the full amount of the judgment, but only such damages as the plaintiff had actually sustained.

In *Commonwealth* v. *Lightfoot*, 7 B. Monroe, 298, which was an action upon the sheriff's bond, and the breach assigned was, that having an execution in his hands, he failed to make sufficient levy, after holding that the action was sustainable, upon the question of damages the court say:

"It does not follow, as a matter of law, that an officer "is rendered liable for the whole debt, by a failure to levy "an execution in his hands. His liability is fixed by the "extent of the injury sustained by the creditor. If the

" collection of the debt be merely postponed, but its safe-
" ty not jeopardized, although the officer, in consequence of
" his misconduct, is liable to an action, he is not to be
" subjected to the same amount of damages as if the debt
" had been entirely lost. In this case the plaintiff has
" failed to manifest by *proof the extent of his injury. He*
" *has not produced any evidence that the defendant in the*
" *execution is insolvent, or that he has been unable to collect*
" *his debt.* He has rested his claim to a recovery of
" the full amount of his execution, solely on the ground
" of the failure of the officer to make a sufficient levy
" without attempting to show the damages he has sustain-
" ed by such failure. In this description of action, *the*
" *amount of the execution is not the measure of damages,*
" *but the actual damage sustained,* to be manifested by the
" peculiar circumstances of each case."

Had this been an opinion delivered in the case at bar, its reasoning could not have been more completely applicable.

In *French et al.* v. *Snyder*, 30 Ills. Reps., 339, which was an action in the case against a sheriff for failing to make sufficient levy on an execution, the same rule is announced in equally explicit language.

To sustain the rule adopted by the court below, the counsel for Hoppock cites Sedgwick on Damages, where it is announced " that the contract itself furnishes the measure
" of damages." Had he consulted this author a few pages further, he would have found the following:

" But when it is said that the contract furnishes the
" measure of damages, it is not thereby meant that the
" party ready to perform his contract will be able to re-

" cover of the party in default, the *entire price named in* " *the agreement.* On the contrary, it has been held in " many cases, that in actions for breach of contract, the " measure of damages is not the price stipulated to be paid " on full performance, but the *actual injury sustained* in " consequence of the defendant's default. For the rule " that the contract furnishes the measure of damages, is " subject to the other rule already stated, that compensa- " tion is only to be given for *actual loss.*" (Sedgwick on the Measure of Damages, 210.) *Hill* v. *Smith*, 12 Meeson & Welsby, 617, and *Alder* v. *Keighley*, 15 Meeson & Welsby, 117, were also cited.

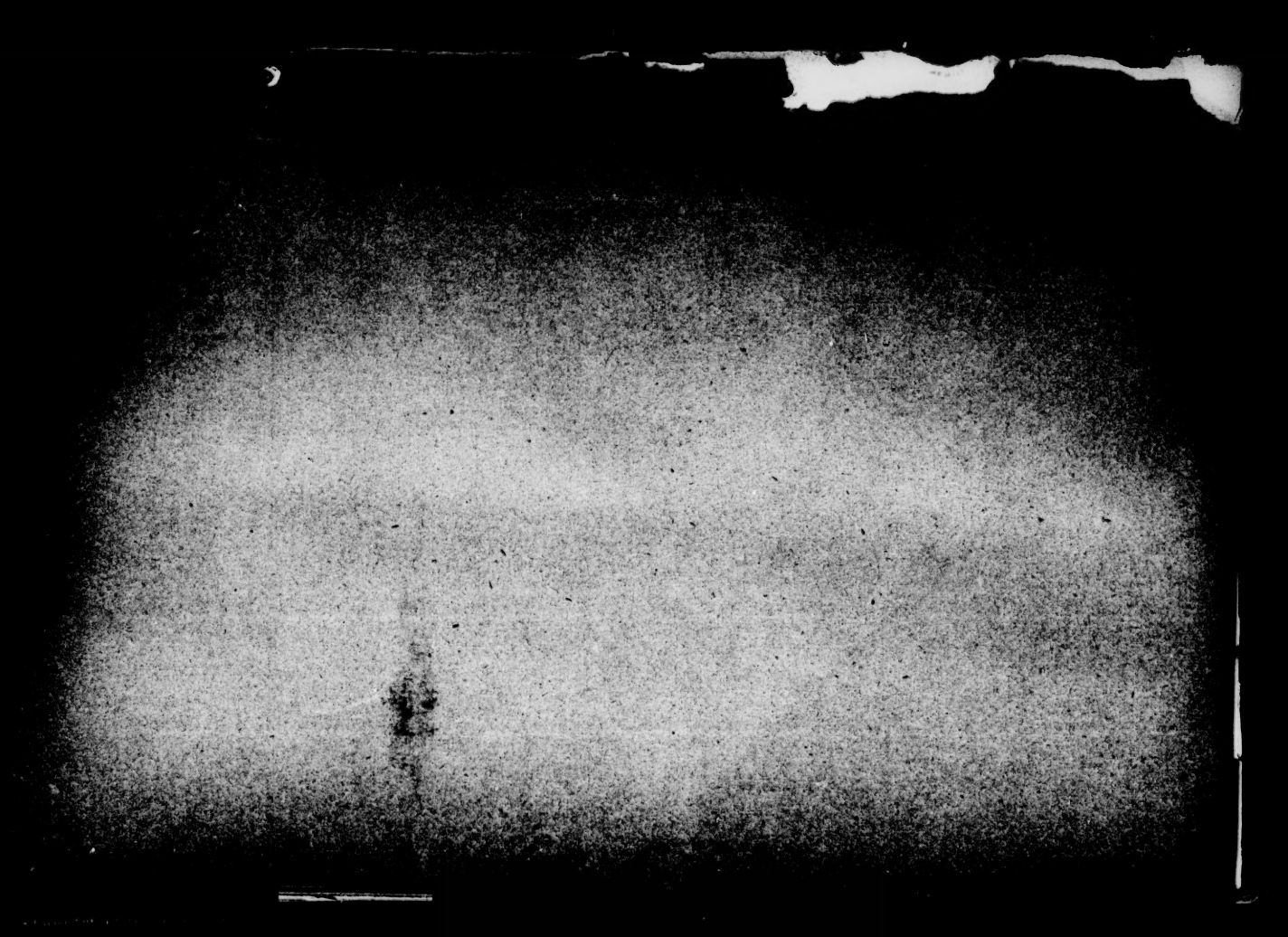
The former was a suit by the assignees of a bankrupt, to recover back money paid to the defendant by the bankrupt, and the question was, whether an independent cause of action of the defendant against the bankrupt could be set off; and the court held that, under the English statute of set-off, it could not. The question in the latter case was the same. POLLOCK, C. B., in delivering his opinion, said: " There is no substantial distinction between this case and " that of *Hill* v. *Smith.*" But what possible bearing either of these cases has upon the question in hand, is not perceived.

Thompson v. *Alger*, (12 Metcalf Mass. Rep.) cited by counsel, is in principle against Hoppock, instead of in his favor. It was a suit to recover the purchase price of railroad stock sold and *transferred* to the defendant, and the court held, that the plaintiff was entitled to recover the full purchase price, for the reason that the title to the stock *had passed* to the defendant before he repudiated the contract; the court at the same time holding that, if the contract had remained executory, and the title to stock had

not passed, the rule of damages would have been, not the full purchase price, but only the difference between the agreed price and the market value of the stock. "Such "rule," say the court, "would do entire justice to the "vendor. He *would retain the property as fully in his "hands as before*, and a payment of the difference "between the market price and that stipulated, *would "fully indemnify him.*" So here, Hoppock retained the property in these judgments against Chapin & Co., as "fully in his hands" after Wicker refused to bid, as before; and the difference between the value of these judgments and the amount agreed to be bid, would as fully indemnify Hoppock as in the case put by the learned judge in *Thompson* v. *Alger*. Had Hoppock sold and *transferred* these judgments to Wicker at an agreed price, and Wicker had then refused to pay, no doubt the rule of damages would have been the agreed price; and it is in this class of cases that the rule applies—that the contract furnishes the rule of damages; but here, not only did the agreement remain executory, and the property in the judgments remain in Hoppock, but there was no agreement that these judgments should ever be transferred to Wicker.

The case of *Thomas* v. *Dickinson*, (23 Barb. N. Y. Rep. 431,) also cited, simply decides that where the plaintiffs had contracted with the defendant for the transfer and delivery to him of a chose in action, consisting of the obligation of a third person, and *paid for it*, and then the defendant refused or failed to procure and transfer it, the plaintiff was entitled to recover as damages the value of the chose in action, and that it was *prima facie* worth par —upon the principle, probably, that the obligor was to be presumed solvent. That case is in principle the same as that of *Thompson* v. *Alger*. Had not the plaintiff parted

with his property by *paying for the chose* in action, the rule of damages would doubtless have been the difference between its value and the agreed price.

If, therefore, this court should be of opinion that the first point, as to the invalidity of the agreement, is not sustainable; then it is submitted that the judgment should be reversed for this error in the court below, as to the measure of damages.

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